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THE UNIVERSITY OF ALBERTA

JUDICIAL ATTITUDES IN CANADA IN RESPECT OF SELECTED LAND USE PLANNING TECHNIQUES AND THE LIKELY IMPACT OF THE CHARTER ON SUCH ATTITUDES

by

MARY BETH GIBSON

A THESIS

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OF MASTER OF LAWS

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The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled "JUDICIAL ATTITUDES IN CANADA IN RESPECT OF SELECTED LAND USE PLANNING TECHNIQUES AND THE LIKELY IMPACT OF THE CHARTER ON SUCH ATTITUDES" submitted by MARY BETH GIBSON in partial fulfilment of the requirements for the degree of Master of Laws.

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Date June 10, 1988

ABSTRACT

The Canadian Charter of Rights and Freedoms has provided Canadian citizens with a set of constitutionally-entrenched rights and freedoms. These range from recognized fundamental freedoms, and democratic and legal rights to more contentious general rights, such as the right to life, liberty and the security of the person and the right to equality before and under the law, and finally to rights specific to Canadian society, such as aboriginal, language and mobility rights. Together, these rights and freedoms provide a powerful basis upon which to challenge otherwise valid federal, provincial, and municipal legislation, as well as practices, policies, and actions taken pursuant to such legislation.

This thesis examines the possible effects of the Canadian Charter of Rights and Freedoms on one area of governmental activity: state regulation of land use.

Specifically, it looks at three especially contentious planning techniques: exclusionary zoning, subdivision exactions, and regulations restricting the exercise of property rights. The initial chapters outline the manner in which these three planning techniques infringe the individual's rights and freedoms and discuss the response of the Canadian judiciary prior to the enactment of the

Charter. With very few exceptions, the Canadian judiciary has upheld the validity of these techniques, notwithstanding the restrictions they impose on the individual's liberty, mobility, freedom of choice, and ability to exercise his property rights.

The final chapters examine what, if any, effect the Canadian Charter of Rights and Freedoms will have on the judiciary's view of exclusionary zoning, subdivision exactions, and regulations restricting the exercise of property rights. After analyzing the many interpretive problems associated with the Canadian Charter of Rights and Freedoms, these chapters conclude that the judiciary will continue to uphold the validity of many planning techniques and only declare invalid those techniques infringing specific freedoms, or discriminating against religious groups, racial and ethnic minorities, and the mentally and physically disabled.

PREFACE

This thesis examines the possible effect of the Canadian Charter of Rights and Freedoms ("the Charter") on the ability of planning authorities to curtail the exercise of an individual's civil liberties and rights of ownership in selected contexts. While many planning techniques restrict the individual's civil liberties and property rights, this thesis only examines three principal forms of land use control: exclusionary zoning, subdivision exactions, and land use regulations which downzone land or impose development freezes. By concentrating on a limited number of land use controls, it will be possible to derive general criteria against which the validity of other planning techniques can be assessed.

Exclusionary zoning is a term referring to those land use controls which block general access to choice, low-density residential areas. For example, restrictive definitions of the word "family" in zoning by-laws frequently limit housing to biological or adoptive families and a specified number of unrelated individuals. Development standards, such as minimum lot size and minimum floor area requirements, also exclude individuals from desirable residential areas by making housing in such areas too expensive for members of the lower and middle classes. Both techniques restrict the liberty of individuals, and deprive them of opportunities and benefits available to "families" and to members of the wealthier classes. Often, the excluded person or group must live in a crowded neighbourhood whose facilities and surrounding environment are of a generally lower standard than is found in a low density residential area.

Planning authorities also place restrictions on the rights of property owners. Two of the more obtrusive techniques are subdivision exactions and land use by-laws downzoning property and creating development freezes. Provincial planning legislation and land registry acts have abolished the landowner's common law right to subdivide his property, and have made subdivision conditional upon the approval of local planning authorities. Typically, these planning authorities require the landowner to dedicate a portion of land to the public use or provide infrastructure for the new community. Provincial planning legislation has also given local planning authorities the power to downzone land, impose holding zones, and place land in agricultural zones in order to regulate the rate of urban development and ensure the adequate provision of public open space. Local planning authorities, by imposing development freezes, force landowners to accept significant restrictions on their development rights and a consequent devaluation of their property.

Prior to the enactment of the Charter, judicial review of land use controls was constrained by the doctrine of parliamentary sovereignty. By virtue of this doctrine, decisions of local planning authorities were immune from review by the courts provided that these authorities acted within the scope of their delegated powers. In order to protect individual rights and liberties, the Canadian courts were required to find the impugned actions of local planning authorities ultra vires the scope of the relevant enabling statute. The courts relied upon common law rules of statutory construction and doctrines of administrative law, many of which proved to be ill-suited to a comprehensive review of land use regulations.

The Charter provides the judiciary with a new and potentially more powerful tool with which to review land use controls. Section 1 proclaims the paramountcy of individual rights and liberties:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Sections 7 and 15(1) enact general rights of liberty and equality. Section 7 states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Section 15(1) reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In addition, s.2 provides guarantees of specific fundamental freedoms which may protect the individual in cases where the more general provisions do not. Section 2 provides:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
> ...
> (d) freedom of association.

Together, these sections of the Charter may provide the Canadian courts with a powerful constitutional basis for striking down land use controls restricting individual rights and liberties.

Although the Charter does provide the Canadian judiciary with new criteria for assessing the validity of land use controls, it is unlikely that they will declare many planning techniques unconstitutional.

One of the major roadblocks to the wholesale re-assessment of land use regulation is the absence of a property right in the Charter. While it is possible that the courts may incorporate a property right into s.7, it is more likely that they will limit the content of s.7 to legal, political, and civil rights. A restrictive interpretation of s.7 would also preclude judicial review of land use regulations affecting the individual's freedoms of choice and movement, although the individual may be able to challenge these regulations under the specific freedoms of s.2. The scope of the equality rights provision is equally uncertain. An expansive interpretation of s.15(1) would enable the Canadian courts to strike down land use regulations denying the poor and under privileged the benefits land use planning affords to the middle classes. Such an interpretation would also grant corporations rights and potentially lead to numerous challenges to the validity of subdivision exactions and discriminatory land use regulations. Conversely, the courts may decide that s.15(1) only grants equality rights to individuals, and only protects religious minorities, the elderly, and the mentally disabled from land use regulations intentionally excluding them from residential areas.

In order to fully evaluate the potential impact of the Charter in respect of the selected planning techniques, it is necessary to first examine the general rationale for state regulation of land use and to then more fully discuss the selected land use planning techniques in light of that rationale. In addition, clues as to how the Charter may be interpreted and applied in the planning context may be gained from reviewing recent Canadian and American decisions in the fields of land use planning and constitutional law. Chapter I provides a general rationale for state regulation of land use, while Chapters II, III and IV examine specific land use planning techniques and discuss the reaction of the Canadian courts to these techniques prior to the enactment of the Charter. Chapters V and VI discuss the various interpretative problems associated with ss.2, 7 and 15(1) of the Charter, making reference to relevant Canadian and American decisions. Finally, these latter chapters outline the manner in which the Charter may affect the validity of the specific planning techniques detailed previously.

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CHAPTER I: THE RATIONALE OF LAND USE PLANNING

Prior to embarking upon a detailed study of the purposes of various planning techniques, it is appropriate to discuss the general rationale of state regulation of land use. An understanding of this rationale will help explain the widespread acceptance of state regulation of land use, and will perhaps suggest why, under s.1 of the Charter,[1] the Canadian judiciary may consider such regulation as justifiable in a free and democratic society.

Theoretically, state regulation of land use would be unnecessary if the individual landowner could make decisions concerning the exercise of his property rights and the allocation of his land resources based on a complete understanding of the effects of his decisions. If the landowner possessed such knowledge, his final decision would reflect the true opportunity cost of his choice and provide him with the maximum benefit obtainable from the use of his land resources. In this theoretical world, the wishes of the landowner's neighbours and the wider community would also be accommodated as the landowner would factor their concerns into his decision. If all landowners made equally well-informed decisions with respect to the development of their land, the entire community's land resources would be allocated as efficiently as possible and developed to the best advantage of all parties.[2]

However, writers in the fields of urban and environmental economics have long recognized that this theoretical model described above bears little resemblance to the reality of urban land use. An individual's decision with respect to the development of his property generates costs and benefits affecting the wider community which cannot be readily valued. Because the individual does not possess a means of evaluating the third-party effects of his actions, he will not consider these when making a decision. Consequently, his land resources will be misallocated, and this individual misallocation will adversely affect the community's overall allocation of its resources.[3]

An example illustrates one type of third-party effect that an individual's decision can create. Assume that an individual owns a vacant lot in a residential neighbourhood. He wishes to sell the land for industrial development incompatible with residential use. The proposed development will cause noise and congestion, while the very presence of an industrial building will substantially detract from the aesthetic value of the neighbourhood. Surrounding homeowners may experience discomfort from living next to an industrial site. This discomfort will affect decisions of potential buyers, causing the value of the homes to drop. Yet the owner will build on his vacant lot if the price offered by the purchaser is acceptable, and will only consider the external costs of his decision if he also owns land adjacent to the vacant lot.[4]

The imposition of external uncompensated costs is one effect of an individual's decision to exercise his property rights; the creation of third-party benefits is the second way in which a private decision may affect the community.

Again, assume that the individual owns a vacant lot in a residential area. He is faced with the decision of selling his lot for high-density residential development or simply leaving the land in its natural state. His neighbours enjoy having the vacant lot in their community as it provides them with a local park. As well, the lot has an aesthetic value for people living in other areas of the city who do not use the land on a daily basis but, nonetheless, derive enjoyment from the knowledge that greenspace exists in their community.

If the landowner wanted to keep the lot in its undeveloped state, but receive some compensation for his decision, he could turn the lot into a private park. It is unlikely that he would be completely recompensed for having made this decision because the fees collected would never match the amount he would receive for his land as a developable unit.[5] In a world governed by the market-place, the owner would probably sell his land for development as high-density housing.

Absent public regulation, two solutions to the problem of external costs are available. The first, proposed by the economist Robert Coase, relies upon bargaining between the landowner and his neighbours.[6] The second uses common law actions to protect the interests of the neighbouring homeowners.

A. The Bargaining Solution

Robert Coase has suggested that individuals can solve the problem of external costs and benefits through the bargaining process.[7] For example, where the landowner's actions produce external costs two alternatives are available: his neighbours may elect to offer the landowner some form of compensation to induce him to discontinue his conduct, or the landowner may decide to develop his land, compensating his neighbours for their resulting discomfort and loss of property values.[8] Where the landowner's actions produce external benefits, the adjacent property owners may pay the landowner to preserve the lot as parkland, or the landowner may offer his neighbours other land or money to compensate for the loss of their parkland.[9]

Coase and his adherents claim that private bargaining between individuals or groups of individuals has at least two major advantages as a method of controlling land use.[10] First, the bargaining process is neutral. Regardless of which party is legally obliged to compensate the other, bargaining will produce a solution representing the most efficient use of the land resources.[11] Second, bargaining is value-free and costless, as two parties will only voluntarily commence this process if they believe that they can improve or protect their respective positions.[12] The bargaining process, therefore, provides a method of attaining a socially optimal and efficient allocation of resources without public intervention.

Coase's theory has sparked much criticism, the most relevant of which concentrates on the distributional questions associated with a private market solution to the problem of external effects.[13] One of the principal attributes of the bargaining solution is its value-free nature. For Coase and his adherents, a final decision to pollute, and one not to pollute, are equally optimal. Both are the result of private assessments of the relative worth of a polluted, or unpolluted, environment. In one case, an individual may have valued increased industrial output more than the quality of his surroundings. In the other, the individual may have favoured the preservation of the environment above industrial production. Coase's theory does not provide a means of assessing which outcome, environmental preservation or industrial production, is more beneficial to the entire community. It assumes that either outcome is correct because both are the result of a bargaining process conducted by two parties of equal strength.[14]

In reality, the two individuals or groups do not possess equal wealth; thus, the initial allocation of property rights influences the outcome of the bargaining process. For example, in the local parkland problem the current legal regime places the neighbours under an obligation to compensate the landowner if they want him to preserve his vacant land. The neighbours are a diffuse group and may be poorer than the prospective developer.[15] Although the neighbours may wish to save the vacant lot, the cost of doing so is prohibitive. Individually, no single neighbour can adequately compensate the landowner. A collective payment is also improbable because there are too many parties to make compensation a practical solution.[16] The costs of arranging payment from the neighbours and the community's residents and estimating the value future residents would place on the preservation of the vacant lot would likely offset benefits stemming from the bargaining process.[17] Yet, the resulting decision to develop the vacant lot is not the optimal one since the alternative of providing compensation to the landowner would benefit both that individual and his neighbours.

The local parkland problem illustrates another deficiency of the bargaining solution, namely that bargaining can only be effective when the two parties can give a monetary value to the external costs and benefits of their actions.[18] Some external costs are comparatively easy to quantify, such as the costs of a landowner's decision to develop his land as an industrial site.[19] In the parkland problem the immediate costs to the neighbours are also easy to identify; they and their children must travel to another part of the city in order to enjoy the amenities of a park. The aesthetic value of a natural area, however, is a public good.[20] No one can be excluded from the enjoyment which they derive from the mere existence of a park in an otherwise developed area, yet, no one may be forced to pay for that enjoyment. Moreover, those individuals who are willing to pay for the park's preservation tend to understate the price they are willing to pay in the hope that someone else will contribute more.[21] Thus, the total value of the park can never be accurately measured. Bargaining will not be effective because this solution depends upon the ability of the parties to assign a price to the object of their negotiation.

Private bargaining will not produce an optimal allocation of the community's resources because it assumes conditions which do not exist in practice. An efficient and equitable bargaining solution requires two parties of equal strength, with equivalent financial resources and equal knowledge of the effects of their actions. If one party is poorer, as is often the case, then the bargaining process will tend to favour the stronger party or the party with fewer members. The costs of entering into the bargaining process and of evaluating the object of the negotiations will often offset the possible advantages to be gained by the weaker party. Thus, the bargaining solution to the problem of external costs tends to reinforce the status quo.[22] In other words, the landowner will develop his land as an industrial site or as high-density apartment buildings. The neighbours and the community will not be able to protect their interest.

B. Common Law Methods

There are four principal common law methods of resolving land use conflicts: nuisance, the doctrine of Rylands v.

Fletcher,[23] restrictive covenants and natural rights of support and air and light.

Each of these methods, for their own specific reasons, are inadequate tools for devising a rational, long-term plan for the use of a community's land resources.

Nuisance is the first of the private law methods of solving land use problems. It prevents unreasonable interference with the use of land by giving the individual the right to seek an injunction or to sue for damages. The nuisance action, however, suffers from a number of deficiencies which make it an ineffective method of controlling land use. First, the plaintiff must have a proprietary interest to be able to sue in nuisance.[24] The current restrictions on class actions make it impossible for community residents to link their interests with that of the property owner, while the interests and concerns of future generations could never be protected.[25] Second, the nuisance action regulates only some external costs, and does not protect the landowner from actions destroying the aesthetic value of his property.[26] Third, the courts, in a nuisance action, balance such factors as the gravity of the injury to the landowner, the nature of the interference, the duration of the nuisance, and the public interest when determining whether to grant the plaintiff his remedy. In general, the courts will only award a landowner a remedy where he suffers damage beyond what other landowners in the vicinity are required to bear.[27] Finally, the remedy afforded by a nuisance action is often retrospective in nature. Although the individual landowner may try to obtain a quia timet injunction, his usual remedy will be an injunction or damages granted after the injury has occurred.[28]

The doctrine of Rylands v. Fletcher,[29] the second common law method of regulating land use, is of more limited application. Traditionally, the successful invocation of this doctrine requires proof of non-natural user and the "escape" of an object likely to cause mischief to the land in question.[30] While Canadian courts have liberally construed the "escape" condition, they still require proof that the impugned action constitutes a "non-natural" use of land.[31] Like nuisance, the doctrine of Rylands v. Fletcher only protects the individual against certain external effects, primarily smoke emission and forms of pollution causing damage to property.[32] Again, like nuisance, whether a specific form of land use will qualify as a "non-natural" use depends upon the perceptions of the judiciary and Canadian society at the time of the action. Finally, like the nuisance action, the doctrine of Rylands v. Fletcher generally regulates the use of land in a retrospective manner, giving the individual landowner the right to sue for damages or seek an injunction once the injury has taken place.

The restrictive covenant, the third common law method of regulating land use, is superior to the nuisance action and the doctrine of Rylands v.Fletcher because it is prospective in nature.[33] Individual landowners may forestall potentially damaging forms of development by creating mutually beneficial restrictions on the use of their properties. These prohibitions attach to the land irrespective of the identity of the owner, and are therefore permanent and consistent. The courts when enforcing the terms of a restrictive covenant do not have the opportunity to make the *ad hoc*, and perhaps subjective, judgements of nuisance cases.[34]

Yet, restrictive covenants do not provide a complete solution to the problem of external costs. In order for the courts to enforce restrictive covenants, certain criteria must be fulfilled.[35] One of the most important is that the party suing on the covenant have an interest in the lands benefiting from the restriction.[36] Another is that the lands be identifiable.[37] The restrictive covenant, like the nuisance action, only provides an effective method of combating external costs when the individual has a direct and quantifiable interest. It will not protect the wider community from the injurious effects of an individual's decision to develop his land. Because the provisions of each agreement may vary, the community lacks the opportunity to rationally allocate its land resources.

Finally, all landowners have natural rights which give them a right of support and a right to air and light.[38] These natural rights protect the landowner from actions causing the subsidence of his land or the blocking of his access to definable flows of air and light. However, the right of support does not extend to the preservation of visual amenities.[39] In order to safeguard these interests, the landowner must obtain an easement from his neighbour or enter into a restrictive covenant. In addition, only people with a possessory interest in land may take advantage of the right of support and the right to air and light. Like many common law methods of regulating land use, they do not protect the interest of a wider community.

None of the common law methods of land use control are sufficiently comprehensive. The nuisance action and the doctrine of Rylands v Fletcher provide arbitrary solutions to the problem of external costs. They lack predictability because the determination of what actions constitute nuisances or non-natural uses depends upon the changing perceptions and values of Canadian society. Restrictive covenants and natural rights of support and light and air have the advantage of stability since the restrictions they impose attach to the land itself. Yet, both methods regulate specific properties or specific areas of the community. Neither method of solving land use problems can cope with external costs affecting a diffuse public. The private legal system does not give the community the tools with which to rationally plan the long-term uses of its resources.

C. Conclusion

State regulation of land use is not the perfect solution to the problem of controlling the external costs of land development. Substantial administrative costs and the inflexibility of some planning tools are two of the reasons why state regulation of land use does not always produce the most efficient allocation of a community's land resources.[40] Further, as the following chapter will demonstrate, the regulation of land use has been intertwined with the segregation of the community along socio-economic lines. Although much of this segregation is an inadvertent result of legitimate attempts to regulate the community's use of its land resources, the presence of such segregation has raised questions concerning the neutrality of the planning process.[41]

Nevertheless, state regulation of land use remains a more effective method of controlling the external effects of development than either unregulated private bargaining or the common law. One of the most important advantages that a state planning authority possesses is its access to the expertise of professionals in the fields of planning, management, finance, and the environmental and social sciences. This expertise provides the planning authority, whether it be a municipal council, the provincial legislature or an administrative tribunal, with a more complete understanding of the ramifications of the various options available to it. Consequently, the final determination of the planning authority will be more likely to enhance the community's welfare. Both other methods of regulating land use tend to benefit only the individual landowner or a discrete group of persons having property rights.

A second advantage of state regulation lies in the planning authority's ability to consider the long-range interests of the community. Because a planning authority has access to information generated by professionals, it can devise land use regulations and plans which accommodate the needs of future members of the community. The capacity to consider the requirements of future generations substantially distinguishes state regulation of land use from the other methods of land use regulation. Both private bargaining and the common law, by their very natures, are incapable of resolving land use conflicts which impact on the needs and wishes of individuals who do not have an immediate interest to protect.

Finally, as Stanley Makuch notes, state regulation of land use is a comparatively democratic method of resolving land use conflicts.[42] It protects the interests of individuals who cannot participate in private bargaining or do not have rights under the private legal system. Members of the community may participate in the initial stages of planning, they possess the right to review the final land use plans, and they can challenge planning decisions affecting their immediate and long-term interest.[43] State regulation of land use provides many avenues for the articulation of "the public interest".

While planning obviously protects the interests of the community, it also benefits the individual whose rights it restricts. Although the developer may now be unable to construct an industrial site in a residential area, his own home is safeguarded against the individual who wishes to start a similar industrial development in this neighbourhood. The owner of the vacant lot also profits from the maintenance of a natural area; the restrictions on his rights enhances the environmental quality of his neighbourhood. In the long run, he and his children will gain from the existence of parkland in a developed area. In exchange for accepting a restriction on some of his property rights, the individual's interests as a member of the community are better protected.

ENDNOTES

1 Canadian Charter of Rights and Freedoms, as enacted in Canada Act 1982 (U.K.), c.11.

2 The theoretical model described in the text is a simplified version of the economic model of how human beings allocate their resources. According to this model, the individual seeks the maximum satisfaction that he can obtain with the scarce resources available to him. His final decision to allocate these resources reflects his assessment of the opportunity costs of choosing one mixture of goods and services in preference to another; these costs are measured by a pricing mechanism. The point at which the individual can no longer allocate his resources in a more beneficial manner is one of "optimality". Economists make the assumption that a community's allocation of resources is an aggregate of all individual decisions. Therefore, once an individual has obtained the maximum benefit he can with his limited resources, a community has allocated its resources in an optimal manner. No alternative allocation would make a single individual better off without detracting from the satisfaction of another person. A discussion of the economic model of decision-making and its applicability to land use problems may be found in the following texts: Graham Hallett, Urban Land Economics, Principles and Policy (1979); A.J. Harrison, Economics and Land Use Planning (1977); Arthur F. Schrieber and R.B. Clemmens, Economics of Urban Problems (3rd. ed. 1982); K.G. Willis, The Economics of Town and Country Planning (1980).

3 The economic model makes four assumptions: individuals when making decisions do not occupy a monopoly position; decisions are made in the context of the two-party trading system; the costs and benefits of each decision can be accurately measured by the pricing mechanism; and there are no costs associated with the bargaining process. The absence of any of these factors leads to "market failure". Once market failure occurs, land use decisions will no longer be "efficient" because the individual will lack the information to make the optimal allocation of his resources. In turn, inefficient decisions will lead to a poor distribution of the community's land resources.

Market failure is described in Schrieber and Clemmens, Economics of Urban Problems, supra n.2 at 65-74; and Willis, The Economics of Town and Country Planning, supra n.2 at 30-87.

4 This example is from Daniel R. Mandelker, Environment and Equity (1981) 7-8.

5 Id. at 12.

6 R.H. Coase, "The Problem of Social Cost" (1960)3 Journal of Law and Economics 1.

7 Id.

8 Id. at 6.

9 Id. at 7.

10 Id. at 5-8.

11 P.S. Elder, "Environmental Protection Through the Common Law" (1973) 12 Western Ontario L.Rev. 107 at 116.

12 J.P.S. McLaren, "The Common Law Nuisance Action and the Environmental Battle-Well Tempered Swords or Broken Reeds" [1972] Osgoode Hall L. J. 505 at 517-518.

13 Mandelker, Environment and Equity, supra n.4. at 11; E.J. Mishan, "The Economics of Disamenity" (1974) 14:1 Natural Resources Journal 55; Alan Randall, "Coase Externality Theory in a Policy Context" (1974) 14:1 Natural Resources Journal 35; Walter Samuels, "Welfare Economics, Power and Property" in Gene Wunderlich and W.L. Gibson, Jr., eds., Perspectives of Property (1972) 61 at 127-46; Willis, The Economics of Town and Country Planning, supra n.2 at 61-64.

14 Randall, "Coase Externality Theory in a Policy Context," supra n.13 at 39-40; Samuels, "Welfare, Economics, Power and Property," supra. n.2 at 119-24.

15 Randall, "Coase Externality Theory in a Policy Context," supra n.13 at 41; Mandelker, Environment and Equity, supra n.4 at 12; Samuels, "Welfare Economics, Power and Property", supra n.13 at 78-90.

16 Mandelker, Environment and Equity, supra n.4 at 12.

17 Willis, The Economics of Town and Country Planning supra n.2 at 64; Mishan, "The Economics of Disamenity," supra n.13 at 66-74.

18 Mandelker, Environment and Equity, supra n.4 at 12.

19 Id.

20 Public goods possess three characteristics which distinguish them from goods capable of being owned by an individual, corporation or public institution. Public goods cannot be supplied to individuals according to their preferences; the producer of a public good cannot exclude an individual from receiving benefits from that good; and the benefits from that good are shares by all individuals regardless of their preferences. Most of the benefits stemming from the conservation of the environment are public goods. Everyone partakes of the advantages of a clean environment regardless of whether they actually care about the environment. They receive these advantages simply by living in the area, and it is impossible to stop anyone from enjoying them. For a discussion of public goods see Willis, The Economics of Town and Country Planning, supra n.2 at 40; 55-57; 72-74.

21 Willis, The Economics of Town and Country Planning, supra n.2 at 72.

22 Samuels, "Welfare Economics, Power and Property," supra n.13 at 79-80.

23 (1868) L.R. 3 H.L. 330, aff'g (1866) L.R. 1 Exch.265.

24 Elder, "Environmental Protection Through the Common Law," supra n.11 at 106.

25 McLaren, "The Common Law Nuisance Action," supra n.12 at 517-18.

26 R.T. Franson and A.L. Lucas, Canadian Environmental Law, v.1 (1976) 360; Fleming, The Law of Torts (6 ed. 1983) 385.

27 McLaren, "The Common Law Nuisance Action," supra n.12 at 518; Stanley Makuch, Canadian Municipal and Planning Law (1983) 194-197.

28 Elder, "Environmental Protection Through the Common Law," supra n.11 at 122; 125-26.

29 (1868) L.R. 3 H.L. 330, aff'g (1866) L.R. 1Exch. 265.

30 A.M. Linden, "Whatever Happened to Rylands v. Fletcher," in Lewis Klar, ed. Studies in Canadian Tort Law (1976) 325 at 334.

31 P.T. Burns and B.V. Stulsky, "The Effectiveness of Tort Liability as an Environmental Control Device: An Analysis", in P.T. Burns, R.T. Franson, J.G. Matkin, and B.V. Stulsky, Environmental Abuse and the Canadian Citizen: A Study of the Adequacy of Legal Remedies (1973) 223-24; Elder, "Environmental Protection Through the Common Law," supra n.11 at 118-119; Linden, "Whatever Happened to Rylands v. Fletcher," supra n.30 at 338; McClaren, "The Common Law Nuisance Action," supra n.12 at 525.

32 Burns and Stulsky, "The Effectiveness of Tort Liability as an Environmental Control Device," supra n.31 at 232-38.

33 Makuch, Canadian Municipal and Planning Law, supra n.27 at 196-197.

34 Id.

35 These criteria are: the restrictions must be negative; the land benefiting from the restriction must be identifiable; there must be a bona fide purchaser for value without notice; the restrictions must be precise; and they must relate to the use of the land. Makuch, Id. at 198.

36 Tulk v Moxhay (1848), 2 Ph. 774, 41 E.R. 1143 (L.C.); London County Council v. Allen [1914] 3 K.B. 642 (C.A.).

37 London County Council v. Allen [1914] 3 K.B. 642 (C.A.).

38 Megarry and Wade, The Law of Real Property (4 ed. 1975) 810-811; 814-815.

39 Id.

40 Robert C. Ellickson, "Alternatives to Zoning: Covenants, Nuisance Rules and Fines as Land Use Controls," (1973) 40 University of Chicago L.Rev. 681 at 711-713.

41 Id.

42 Makuch, Canadian Municipal and Planning Law, supra n.27 at 200.

43 The Planning Act, R.S.A. 1980, c. P-9 is typical of provincial planning legislation. The public may question the contents of regional and municipal plans prior to their adoption by council (ss. 48(1);62). Citizens may appear before the Planning Board when a municipal council appeals provisions of a regional plan (s.58(d)). Persons affected by a decision of a development control officer may appeal the decision to the Development Appeal Board (s.85(1)).

CHAPTER II: RESTRICTIONS ON INDIVIDUAL RIGHTS AND CIVIL LIBERTIES: EXCLUSIONARY ZONING

Land use regulations play an unintentional, but important, role in controlling the socio-economic mix of a neighbourhood by creating legal, financial, and administrative barriers to the free movement of individuals within a community. These barriers range from outright prohibitions on a particular form of land use to more subtle planning techniques, such as conditional approvals for controversial forms of residential development, regulations establishing different approval processes for different types of land use, and onerous development standards. Individuals who are affected by these restrictive land use regulations discover that, while they retain a theoretical right to settle anywhere within a city, their ability to exercise this right is limited by the need to fulfil the requirements of the land use by-law. At issue, is the extent to which a planning authority may incidentally regulate individual liberty by controlling the use of land.

A. Selected Exclusionary Land Use Regulations

1. Land use by-laws excluding high density Residential Development

Most provincial planning legislation obliges municipal councils to enact land use by-laws dividing the municipality into land use districts and prescribing the permitted and discretionary uses within those districts.[1] Local planning authorities have traditionally fulfilled their statutory obligations by separating their jurisdictions into residential, commercial, and industrial districts. Within each of these primary districts, planning authorities permit different intensities of development. For example, the City of Edmonton land use by-law establishes thirteen residential districts: among them, single-detached, low-density, semi-detached, row-housing, medium density, low-rise, medium-rise and high-rise apartment, residential, rural residential, and mobile home land use classifications.[2] Permissible forms of land use in the first district are limited to single detached homes and group homes whose population is less than six,[3] and in the second and third districts, to single family detached and semi-detached dwellings, as well as group homes whose population is less than six.[4] The other land use districts contain progressively more varieties of residential development.

The power to divide a city or town into land use districts reflects the underlying rationale of state regulation of land use. Traditionally, zoning has been viewed as a method of protecting residential areas from the external effects of industrial, commercial, and high density residential development.[5] Planners commonly cite the increased noise, congestion, traffic, pollution, and general ugliness associated with intensive residential development as reasons for segregating it from districts of detached and semi-detached homes.[6] By dividing the community into districts, a municipal planning agency negates the deleterious effects of intensive forms of land use, causing these costs to be borne by the people living in multi-family housing projects or apartment blocks.[7] At the same time, by separating such residential development from single detached homes, the municipality is better able to rationalise urban growth, and develop comprehensive policies for the provision of transportation services, utilities, and public facilities.[8] In theory, this rational urban growth benefits every member of the community, not merely those living in low-density areas.

Fiscal concerns also influence a municipal council's decision to segregate forms of residential development. Under current tax sharing agreements, municipal governments in Canada possess few sources of revenue. The principal means by which municipal governments obtain funds, other than by the receipt of grants from the provincial governments, is by the imposition of real property taxes, business taxes, license fees, and user charges.[9] At the same, time, the responsibility of municipal governments to provide services continues to increase.[10] The financial position of municipal governments, therefore, provides them with an incentive to encourage forms of development providing the most revenue. In The Report of the Federal/ Provincial Task Force on the Supply and Price of Serviced Residential Land: Down to Earth ("the Greenspan Report"), the authors conclude that while residential development generally is not a lucrative source of revenue, among the common types of residential development, single detached homes and apartment buildings create smaller deficits than other forms of housing.[11] The authors of the Greenspan Report suggest that municipalities have neglected to provide for townhouses and row housing because these types of residential development do not increase their financial resources.[12]

Finally, land use regulations excluding high density residential development are occasionally motivated by local concerns over maintaining the social stability of a neighbourhood. The influx of new residents, particularly those belonging to different social and economic classes than the majority of the community, can often create tension in an otherwise stable and homogenous neighbourhood. Existing residents may perceive newcomers as a threat since their values and ways of life are usually not those of the established community. The resultant psychological distress is a type of external cost generated by intensive residential development, and one which, in principle, should be given some consideration when planning for high-density residential development.[13]

However, land use regulations that are enacted to maintain community stability and homogeneity are controversial since it is difficult to determine whether these regulations reflect legitimate planning concerns or stem from prejudice and fear of change. The planning process, as it now stands, provides a number of avenues through which community groups and ratepayer associations can voice their views on any given land use regulation.[14] While the participatory element of land use planning is normally considered one of the advantages of the planning process, in some circumstances it can prove to be a disadvantage. Community groups and ratepayer associations, by conducting well-organised campaigns, are able to lobby planning officials and municipal councils. This latter body, because it is composed of elected officials, may be influenced by the view of community members.[15] As a result, land use regulations occasionally demonstrate a bias towards protecting the immediate interests of the community.[16]

Regardless of the underlying reasons, studies suggest that land use regulations limiting high-density residential development to specific areas of a city have the effect of dividing a city along socio-economic lines.[17] While formerly the exclusionary effects of restrictive residential zoning were felt by lower income households, apparently this type of land use regulation is now blocking the access of middle income families to low-density residential areas.[18] Affordable housing for a significant portion of Canadian society no longer takes the form of single family detached homes. Townhouses and row housing are quickly becoming the common types of residential development for members of the middle classes, while low-cost housing projects provide the only possibility for lower income families to acquire housing other than on a rental basis.[19] By continuing to create districts of single family detached homes, municipal councils ignore the realities of the Canadian housing market. They act, in general, to protect existing residents from an increase in taxes and a decrease in the quality of their physical environment.

The social ramifications of a policy of restrictive residential zoning are outlined by Michael Goldberg in The Housing Problem: A Real Crisis?:[20]

> Governments are elected to carry out political decisions and are generally swayed by political rather than economic considerations, but the

> political and the economic good often coincide. Housing is a unique good which possesses many social as well as economic characteristics. Many Canadians put a high value on home ownership as a measure of security, status, wealth, and general well-being. Social reformers have long contended that the poor must be well housed before they can break out of the poverty cycle. Housing policy is thus also a crucial component of social policy.

By prohibiting and restricting the extent of high density development, a municipal council maintains the status quo of the immediate community. In turn, a decision favouring the immediate community deprives incoming residents of the opportunity to acquire housing in an area which may be desirable for its aesthetic qualities, proximity to places of employment, and location near public facilities and services.

2. Development standards and Subdivision exactions

In addition to dictating the type of development in each land use district, municipal councils also regulate the form of residential land use in both developed areas and subdivisions. Planning legislation enables municipal councils to establish minimum lot sizes, minimum distances between buildings, the number of buildings on each lot, the distance of each building from the street, and to create regulations governing the appearance of all buildings.[21] Municipalities also have the power to enact similar standards governing development in newly-created suburbs.[22] In addition, some municipal councils have the power to enact growth control schemes by restricting the number of lots subdivided from an area during any calendar year.[23] Others can create subdivisions for special forms of development and enact regulations applicable only to these districts.[24]

Municipal planning authorities also have the capacity to make subdivision approval conditional on the payment of cash, the provision of services, and the dedication of land for public use. The Planning Act, R.S.A. 1980, c. P-9, for example, enables municipal councils to require the person subdividing his land to fulfil the following conditions: to construct or to pay for the construction of roads providing access to the subdivision; install or pay for the installation of necessary utilities; construct or pay for the construction of parking facilities; and pay off-site levies.[25] In addition, developers in Alberta must dedicate a percentage of their land for public roads, environmental reserves, and school and municipal reserves.[26] Municipalities may also exact a monetary payment in lieu of land for school and municipal reserves.[27] In Ontario, landowners and municipal councils enter into development agreements which specify that the developer will fulfil any conditions that the council deems necessary and reasonable.[28] These conditions generally include such items as the dedication of land for community use and payments towards the financing of utility and sewerage services.

Development standards and subdivision regulations govern the form of development within specific land use districts in order to ensure that individual homes do not detract from the ambience of the neighbourhood, and that each home is provided with adequate public facilities. Regulations prescribing minimum lot sizes let the municipality standardise utility services in developing areas.[29] Other regulations, such as minimum floor area requirements and density controls, prevent overcrowding in areas of multi-family dwellings.[30] By regulating the number of people in a subdivision, a municipality can also tailor the demand for public services to its fiscal resources.[31] Some development standards are related to building codes and provincial health and safety regulations, and thus serve to protect the inhabitants of residential districts.[32] Other regulations, controlling the outward appearance of homes, attempt to forestall the construction of buildings which, by their very appearance, detract from the physical environment of the neighbourhood.[33] Subdivision conditions help offset the cost of new urban growth to the municipality and its resident taxpayers, and ensure that the new district is provided with public services, infrastructure, and public parkland.[34] By enacting development standards and subdivision regulations, municipal councils hope to achieve ordered aesthetically-pleasing urban growth, at least cost, fiscally and socially, to the community.

A series of reports on housing in Canada have concluded that the development approval process, development standards, and subdivision exactions contribute to housing costs, and thus deprive the poor and members of the middle classes of the opportunity to purchase their own homes. The first of these reports, Costs in the Land Development Process, examined the rise in housing prices during the 1964-1974 period.[35] Its author, Andryez Derkowski, concluded that the duration of the development approval process and the imposition of the excessive development standards contributed to the rise in prices during that period.[36] He contrasted the housing market in Calgary with that of Edmonton. Housing prices were higher in the latter city, largely as a result of the time that it took for the city planning department to administer the development approval process.[37] The City of Montreal, which retained a policy of paying for new urban development by the imposition of local improvement taxes, had the least expensive housing of ten major Canadian cities.[38] Its situation was contrasted with those of Toronto and Vancouver, cities in which a policy of shifting costs to the developer helped cause some of the country's most expensive housing.[39]

Another study of housing costs in Canada, The Greenspan Report, also examined the effect of municipal land use policies on the price of housing.[40] Its authors concluded that, in the short run, demand for residential housing was the most important factor contributing to the escalating price of residential lots.[41] However, the authors also noted that, when compared with construction costs, the cost of land had gradually assumed a larger proportion of total housing prices.[42] The Greenspan Report cited municipal policies of exacting lot levies, shifting servicing costs to the developer, and requiring land dedications as factors ultimately leading to the restriction of the supply of developable land.[43] The authorities concluded that, in the long term, municipal land use regulations would contribute to increased housing costs in Canada.[44] The Housing Problem: A Real Crisis? has recently confirmed the conclusions of the Greenspan Report.[45]

The imposition of high development standards and substantial subdivision exactions is one of the most subtle forms of exclusionary zoning. Development standards do not explicitly discriminate against certain individuals or expressly prohibit the construction of medium and high density housing. Instead, a municipal council, in its attempts to maintain the quality of residential development, applies similar standards to all prospective homeowners, regardless of social and economic status. As a consequence, the municipal council excludes those people unable to afford the cost of constructing housing to the standards set by the land use regulations. While, theoretically, every individual may move into low-density residential districts, in practice, this freedom may only be exercised by the wealthier members of society.

3. Restrictive definitions of "Dwelling" and "Family"

In this form of exclusionary land use by-law, municipal governments commonly define "family" and "dwelling" in such a manner as to limit the type of person who can live in districts of detached and semi-detached housing. In general, these by-laws, known as single family zoning by-laws, allow only persons related by blood, legal, or marital ties and a specified number of unrelated individuals to live in low-density residential districts.

Definitions of "family" and "dwelling" range from the highly restrictive, which limit "families" to people interconnected by blood or marriage, to the more liberal, which permit a specified number of unrelated individuals to live in one house. An example of a restrictive definition of "family" is found in the Township of Esquimalt's by-law where a "family" is a "person or group of persons who, through marriage or blood relationship normally live together in one dwelling unit."[46] No provision is made for common law relationships, boarders, or foster children. The Municipality of Saanich gives a broader meaning to "family". In its by-law, a single family dwelling is described as a "residential use of a building for one dwelling unit only."[47] A dwelling unit is further defined as a "housekeeping unit ... for the exclusive use of a family maintaining a household."[48] A "family" includes "one or more individuals who by reason of marriage, heredity, adoption, or choice live as a household, provided that the number of persons unrelated by blood shall not exceed four."[49] The by-law, however, excludes boarders, day care children, and religious groups from its definition of family.

A still more liberal policy is evident in the City of Edmonton's land use by-law. A single dwelling is "one or more self-contained rooms provided with sleeping and cooking facilities, permanently, or semi-permanently for a household and either up to two lodgers, roomers, or boarders, or four foster children."[50] A household comprises a "person, or two or more persons related by blood, marriage or adoption or a group of not more than five persons who are not related by blood, marriage or adoption."[51] A variety of living arrangements are capable of falling within this definition; for example, common law relationships, adoptive and foster families, religious groups, and people living together for financial reasons.

Finally, the most permissive definition of a single family detached dwelling is contained in the Land Use Order of Improvement District No.10 in the Province of Alberta. This Land Use Order states that "one family" dwellings are permitted uses in all residential districts.[52] The Land Use Order does not define the word "family", but does describe a "dwelling unit" as a "complete building or self-contained portion a portion of a building, set or suite of rooms for the use of one or more individuals, living as a single housekeeping unit".[53] The requirement that people live as a single housekeeping unit ensures that the building is used for residential purposes without dictating the identity of the occupants.

Land use by-laws containing restrictive definitions of "family" and "dwelling" represent another method by which municipal governments attempt to control the adverse effects of high-density residential development. For example, single family zoning by-laws of the type used by the City of Edmonton regulate the size of a district's population by placing a numerical restriction on unrelated individuals compatible with the limit established by provincial health and safety regulations.[54] It also protects the neighbourhood from becoming too crowded by limiting the number of unrelated people in each house to the approximate size of a family.[55] The restriction thus preserves the tranquility, cleanliness, and spaciousness of low-density residential districts, and ensures that the residents have easy and frequent access to the community's public facilities. For the owners and occupants of single family homes the by-law helps to maintain the benefits commonly associated with better residential districts.

A subsidiary, but related, goal of single family zoning is the protection of the neighbourhood's social stability. By-laws which define land use by reference to the personal relationship of the occupants reflect certain assumptions about the attributes of traditional families.[56] First, there is a general belief that a family group is a stable relationship, and therefore will not disrupt a neighbourhood's tranquility. Second, it is assumed that the members of a family, because they live in one home for a lengthy period, will maintain the physical quality of their surroundings and participate in community affairs. In contrast, unrelated individuals are thought to be transient, and thus more likely to disrupt the social fabric of the community and let their buildings and lawns deteriorate. In this respect, single family zoning is designed to exclude a mobile population which would normally inhabit apartment buildings and boarding houses.[57]

Writers in the field of land use planning have questioned the soundness of the distinction drawn between related and unrelated individuals.[58] Critics of single family zoning by-laws argue that the goal of controlling population density is not advanced by allowing large groups of related individuals into residential districts while simultaneously limiting the number of unrelated people.[59] Similarly, they point out that municipal councils do not necessarily maintain a quiet and stable environment by restricting occupancy in low-density residential districts to traditional families, as families are no more stable, and no less disruptive, than individuals living in other relationships.[60] In light of these considerations, critics of single family zoning by-laws state that people who adopt non-traditional living arrangements should not be excluded from low-density residential districts, particularly if such people do not threaten the social stability of the community.

To a limited extent, some Canadian municipalities have acknowledged the validity of these criticisms, and have expanded their definitions of "families" to include boarding arrangements, common law relationships, foster families, and communal relationships.[61] Nevertheless, municipal councils appear reluctant to completely abandon single family zoning and replace it with definitions which eliminate the distinction between traditional and non-traditional families. A zoning by-law of the type found in the Land Use Order of Improvement District No.10 is generally perceived as too broad, because it might permit the construction of controversial uses such as group homes, halfway houses, and detention centres.

Thus, municipal councils continue to enact restrictive definitions of "family", thereby creating a disparity between the number of individuals who can inhabit a dwelling if they are related to one another and the number of individuals who can inhabit a similar dwelling if they are unrelated. A biological family may be of any size, while the size of a family of unrelated individuals is limited by the provisions of the land use by-law. The restrictions on the rights of some individuals are obvious: single family zoning by-laws affect the individual's mobility, his freedom to choose where he will live, and his freedom to associate with whom he pleases. Moreover, single family zoning by-laws, by establishing a distinction between traditional and non-traditional families, discriminate against individuals choosing to live in the latter arrangement.

The implicit assumption of single family zoning by-laws, that only traditional families create a stable and pleasant atmosphere, leads to the exclusion of individuals equally entitled to enjoy the benefits of low density residential areas. These individuals may include the elderly, the mentally and physically disabled, and the underprivileged members of society who, because of circumstances peculiar to themselves, must live in groups larger than that permitted by the zoning by-law. Consequently single family zoning by-laws also tend to discriminate against groups whose members, by themselves, generally cannot afford to purchase homes in low-density residential areas.

4. Restrictions on discretionary Residential Development

Single family detached and semi-detached homes are usually permitted as-of-right in residential districts. Group homes, halfway houses, day care centres, and senior citizen housing are generally authorized at the discretion of the planning authority. This distinction is important as it governs the extent to which a development officer may impose conditions upon the construction of specialised forms of housing. Development permits for the construction of single family detached homes are issued automatically, if the proposed construction fully complies with the terms of the applicable land use by-law.[62] If the use is classified as discretionary, a development officer may refuse an application on its merits, or approve it subject to compliance with additional requirements.[63] Thus, the sponsors and occupants of specialised housing must undertake procedures that the municipal council does not demand of owners and occupants of single family detached homes.

The group home policy of Ontario municipalities illustrates some of the restrictions that a planning authority may place upon the construction of specialised housing. Ontario municipalities commonly draw a distinction between three classes of group homes: group homes, group residences, and crisis residences. Group homes accommodate three to ten persons, and the residents simulate a traditional family life as much as possible.[64] Group residences are similar to group homes, but house a larger number of people. Crisis residences provide short-term, immediate care for a more transient population.[65] Ontario municipalities can restrict the number of group homes within any district and establish minimum distance requirements between these homes.[66] Group and crisis residences are completely excluded from low-density residential districts and can only be located on the fringes of commercial or industrial districts.[67]

The City of Victoria also distinguishes between types of group homes, permitting homes for children, senior citizens, and the mentally and physically disabled in low-density residential areas, while prohibiting the construction of detention centres and facilities for the treatment of drug and alcohol addiction.[68] The sponsors of all types of group homes must operate them from houses built prior to 1931 and used as residences for at least twenty years.[69] The operators of these may only make structural changes necessary for the provision of adequate care of the residents or access into the house.[70]

Finally, the City of Calgary defines a "special care facility" as a:[71]

> ... building or portion thereof which provides for the care or rehabilitation of individuals, with or without the proviso of overnight accommodation and includes nursing homes, geriatric centres and half-way houses but does not include hostels, child care facilities and senior citizen housing.

No restriction is placed on the number of residents who may occupy these homes. However, special care facilities are not permitted in the most exclusive residential districts and are classified as discretionary uses in all other residential zones.[72] In all residential districts, applications to develop group homes must be posted for seven days prior to the granting of a development permit.[73] All other applications for discretionary use permits must only be published in the local paper after the application has been approved.[74]

Controversy surrounds many discretionary forms of residential development as local residents perceive such development as a threat to the social stability and the physical quality of their community. These fears are particularly apparent in the debate concerning the construction of group homes in low-density residential areas.

The debate centres upon whether municipal councils should automatically grant the sponsors and operators of group homes the permission to construct and operate homes in residential districts. Those people who support an as-of-right policy argue that the placement of group homes in family-oriented neighbourhoods aids the process of "normalization".[75] Given the opportunity to live a "normal life", the inhabitants of group homes gradually learn to interact with the community and cope with the daily stresses of society. Similar arguments are advanced to support the construction of halfway houses in residential districts, and, to a lesser extent, detention centres.[76] By excluding these institutions, municipal governments impede the socialization process.

Opponents of an as-of-right policy question the effectiveness of group homes.[77] They also stress that group homes place a strain on the community's financial resources and public facilities since people who live in group homes require additional medical and psychiatric care.[78] They point to the obvious dangers of placing detention centres in family-oriented districts and argue that similar dangers stem from people who live in half-way houses.[79] Finally, the opponents of an as-of-right policy claim that property values are lowered whenever group homes, halfway houses, and detention centres are placed in residential districts.[80]

Some Canadian municipalities, in response to this controversy, have adopted policies which strive to accommodate the arguments of both sides. Sponsors of group homes may establish these institutions in family-oriented neighbourhoods as long as they meet the conditions imposed by various municipal governments. Yet, these conditions indicate a continued concern for the maintenance of a stable, uncrowded, and homogenous neighbourhood.

By-laws distinguishing group homes with a population of five or less from homes built to accommodate a larger number of residents reflect a desire to maintain an uncrowded environment. Homes with a large population create problems of congestion and noise, as does any other multiple dwelling development.[81] Homes with large populations also strain the community's financial resources and public services; therefore by-laws excluding such homes protect the present residents from increased taxes or a decline in the standard of public services.[82]

Other by-laws evidence a desire to protect the stability of residential districts. Municipal by-laws in Ontario distinguish between group homes, group residences, and crisis residences.[83] While the first of these uses is perceived as compatible with single family detached homes, the latter two uses, because of their size and the personal characteristics of their inhabitants, are confined to commercial districts.[84] The City of Victoria's by-law, by excluding detention centres and facilities offering psychiatric care, demonstrates a similar concern for the potentially adverse consequences of placing residents of these homes in family-oriented neighbourhoods.

The City of Calgary's by-law reveals another aspect of the concern for community stability. While arguments concerning the adverse effect of group homes upon the community and upon property values have been demonstrated to be ill-founded,[85] residents continue to worry about the threat that group homes present to both the social cohesiveness of their community and the value of their investment in residential property.[86] The notice provision in the Calgary by-law warns adjacent landowners of the impending application for a development permit and provides them with the opportunity to voice their objections prior to the development officer's decision. The notice provision gives the sponsors of the group home and the residents the chance to discuss the community's concerns and to negotiate a compromise solution. Yet, the by-law also provides community groups with the time to halt construction of group homes, if these groups are sufficiently vocal and organised.

The imposition of substantive and procedural conditions on discretionary forms of development once more raises the issue of the extent to which land use regulations should be able to influence the social mix of a neighbourhood. Municipal councils can very easily justify their restrictions by referring to the external costs that group homes, detention centres, and housing projects for the elderly create for existing residents. By enacting a restrictive land use by-law, the municipal council may simply wish to ensure that discretionary forms of residential development do not detract from the ambience of a low-density residential area. Yet, most of the costs imposed by discretionary forms of residential land use do not stem from their physical attributes, but from the social tension resulting from an influx of people who do not fit into the traditional concept of a family. It is therefore questionable whether controls of discretionary forms of development reflect merely a concern with maintaining the neighbourhood's physical environment.

B. Judicial Response To Exclusionary Zoning

To date, comparatively few Canadian cases exist on the subject of exclusionary zoning. The majority deal principally with one type of land use planning technique, namely land use regulations containing restrictive definitions of "family" and "dwelling" or variations thereof.[87] A few cases concern the validity of land use by-laws discriminating against religious and ethnic minorities,[88] and two address the validity of by-laws having the potential to exclude lower income households.[89] In general though, the Canadian courts have been presented with few opportunities to rule on the validity of the selected exclusionary zoning techniques, and, therefore, generalisations about the judicial reaction to these techniques are difficult to make.

The decisions which do exist on the subject of exclusionary zoning show that the courts have relied upon the doctrine of ultra vires to review exclusionary land use regulations, and have struck down these regulations when the municipal planning authority has exceeded the scope of its enabling legislation. Among the specific tools that the courts have used are the rules of statutory construction and common law doctrines such as bad faith, discrimination, and unreasonableness. This chapter examines Canadian decisions on exclusionary zoning according to the legal doctrines invoked by the courts and attempts to determine whether these doctrines can be used to strike down some of the selected planning techniques which have not been examined by the Canadian courts.

1. Judicial construction of "Family" and "Dwelling".

One of the methods that Canadian courts have frequently used to protect personal liberty against exclusionary zoning by-laws is that of construing such by-laws against the municipal authority and in favour of the individual. Reliance on the rules of statutory construction is particularly noticeable in the cases dealing with the validity of single family zoning by-laws. There, the central issue has often been whether non-traditional family groups live in a manner sufficiently similar to that of a traditional family and use facilities sufficiently similar to "dwellings" or "residences" as to meet the requirements of single family zoning by-laws. In general, the decisions of the Canadian courts show a growing understanding of the role of single family zoning by-laws in preserving the residential character of a neighbourhood, and a corresponding belief that non-traditional families do not threaten this character.

Prior to the late 1960's, few cases had discussed the nature of zoning for residential use. The majority of decisions dealt with the ability of Ontario municipalities to declare any given street a residential street pursuant to s.406(10) of the Municipal Act, R.S.O. 1914, c.12. These decisions indicate that the courts considered that the primary purpose of this power was to protect and enhance the residential character of the designated area.[90] Accordingly, the courts upheld the rights of individuals and groups to construct buildings that were compatible with a residential neighbourhood: religious houses,[91] assembly halls,[92] hospitals,[93] and apartments.[94] Illustrative of this group of cases is the decision of the Ontario Court of Appeal in Regina v. Heit.[95] The municipal by-law in question stated that "no building shall be erected or used for any purpose other than a private building."[96] An individual, having remodeled a single family dwelling into three apartments, was charged with a violation of a by-law. The Court held that the by-law had two purposes: to prohibit commercial industrial or business development, and to ensure that new construction did not detract from the quality and appearance of the area.[97] In the Court's opinion, apartments in a renovated house did not conflict with the underlying purposes of the by-law.[98]

The by-laws discussed in these early cases did not define "residential" or "private residential" dwellings. Thus, the by-law was open to liberal or restrictive judicial interpretation depending upon the circumstances and the nature of the application before the courts. The Ontario courts adopted a liberal interpretation; the British Columbia Supreme Court in Shaugnessy Heights Property Owners v. Children's Aid Society of Catholic Archdiocese of Vancouver [99] chose to interpret "private dwelling house" in a more restrictive manner. In this case, a local community group sought an injunction prohibiting the operation of a home for foster children in their neighbourhood. The relevant provision of the by-law prohibited the construction of buildings other than those used as "private dwelling houses".[100] The Court interpreted the term as equivalent to "single family residences".[101] The Court concluded that the children and their supervisors did not constitute a family because the children's occupancy was on a short-term basis and the operators of the home were reimbursed by the provincial government.[102] Unlike the Ontario courts, the British Columbia Supreme Court did not discuss the purposes of residential zoning, but emphasized the identity of the home's occupants in its analysis of the by-law. As a result, the children were excluded from the district.

These early Ontario and British Columbia decisions are indicative of the conflicting views the Canadian courts have taken towards zoning by-laws which regulate land use in residential areas by restricting development to single family dwellings. The Ontario courts adopted a functional approach. They first examined the purposes of residential zoning, and then determined whether or not the proposed development was compatible with these purposes. The British Columbia Supreme Court, however, adopted a literal interpretation, holding that the occupants of detached dwellings must be a family in the traditional sense of the word.

In the decisions of Regina v. Brown Camps Ltd.[103] (Brown Camps I) and City of Barrie v. Brown Camps Residential and Day Schools Ltd.[104] (Brown Camps II), the courts again demonstrated that differing interpretations of the purposes of single family zoning can give rise to conflicting decisions. Both cases concerned the enforcement of a single family zoning by-law against the operators of homes for emotionally disturbed children. The organization and method of operation of the homes were the same. Yet, in the first decision, the Ontario Court of Appeal characterized the home as a commercial enterprise, while, in the second, it categorized the inhabitants of the home as a family. Consequently, the by-law was enforced in the first case, but not in the second.

In Brown Camps I,[105] a non-profit organization attempted to establish a home for emotionally disturbed children. Occupancy was restricted to four children and miscellaneous staff members who did not live on the premises. The children were placed in the home by the Children's Aid Society. Brown Camps Ltd. received an allowance for each child. The applicable municipal by-law designated the premises for use as a single family dwelling. "Family" was defined as "one or more persons living in a single housekeeping unit." No numerical restriction was placed on the number of persons who could live in a dwelling.[106] The organization was charged by the municipality for having violated the by-law and convicted by the Ontario County court. This conviction was overturned by the Ontario Divisional Court.[107]

Mr. Justice Kelly, writing for the Ontario Court of Appeal, reversed the decision of the Divisional court, upholding the original conviction.[108] The key to his Lordship's judgment lay in his initial decision to examine only the use that Brown Camps Ltd. made of the building.[109] Accordingly, Mr. Justice Kelly considered the identity of the occupants as relevant only in so far as occupancy would help determine the use of the premises.[110] His Lordship classified the use as a commercial one, stating that Brown Camps Ltd. was engaged in the business of providing accommodation, board, instruction and treatment on a remunerative basis.[111]

His Lordship then considered whether the relationship of the occupants was so like a family relationship as to offset the commercial use of the premises. Mr. Justice Kelly acknowledged that the by-law's definition of family was broad enough to permit the occupancy of a house by a large number of unrelated individuals provided that they acted as a family or as a single housekeeping unit.[112] However, his Lordship considered that the voluntary selection of one's partners was the essential element of a family-like relationship among unrelated people.[113] Pointing to the passive role of the residents and their inability to select where and with whom they lived, Mr. Justice Kelly stated that the necessary "voluntary" element was lacking in the children's relationship with one another and with their supervisors.[114] Consequently, his Lordship held that Brown Camps Ltd. had violated the by-law.[115]

In Brown Camps II, the City of Barrie sought a permanent injunction restraining Brown Camps Residential and Day

Schools Ltd. from operating a group home in an area zoned for single family homes.[116] Section 3.26 of the by-law defined a dwelling unit as a "separate set of living quarters designed for, or used by, an individual or one family alone."[117] Section 3.28 defined "family" as "one or more persons who are interrelated by bonds of consanguinity, marriage or legal adoption, or not more than five unrelated persons."[118] The by-law also established districts in which clinics and nursing homes were permitted uses.[119] Neither use was allowed in the single family home district.

As in Brown Camps I, the children were placed in homes at the request of a provincial agency. Brown Camps Residential and Day Schools Ltd. assigned the children to specific homes. The children were supervised by day care staff, the majority of whom did not remain on the premises during the evening. Medical and dental care was provided by local professionals.[120] A resource group of local doctors and social workers provided necessary counselling. Not more than five children were placed in each home.[121]

Because of the similarity between the operation of the home in Brown Camps I and the workings of the present home, the City of Barrie argued that Brown Camps Residential and Day Schools Ltd. was actually operating a medical clinic, and had consequently violated the zoning by-law. The City asked for a permanent injunction to stop the further operation of the group home.[122]

The Ontario Court of Appeal refused to grant the injunction, concluding that the individuals living in the home fell within the by-law's definition of family.[123] Unlike the Court of Appeal in Brown Camps I, the Court of Appeal in Brown Camps II held that the use Brown Camps Residential and Day Schools Ltd. made of the premises was immaterial.[124] According to the Court, s.3.26 of the by-law emphasized the relationship of individuals living in the building, requiring them to be a family as defined in s.3.28.[125] The Court felt that this emphasis upon the identity of the occupants distinguished the by-law from the one discussed in Brown Camps I.[126] Although the provincial agency selected children for treatment and Brown Camps Residential and Day Schools Ltd. received an allowance for each child, the Court did not place any importance on the involuntary nature of this relationship.[127] Rather, after examining the evidence, the Court concluded that the premises were used "for the care and upbringing of these children in the same manner as if they were being used by parents with special expertise to deal with their children who had similar emotional problems."[128]

The holdings of these two cases are difficult to reconcile. Faced with essentially the same facts, the Ontario Court of Appeal arrived at two completely different views of group homes. In the earlier decision, the Ontario Court of Appeal appeared to be concerned with the quasi-commercial nature of the group home, and stressed that the by-law in question precluded commercial development in residential districts. In the later decision, the Court of Appeal dismissed the City of Barrie's argument that the group home constituted a medical clinic, and instead found that the home was a quasi-residential form of land use and its inhabitants resembled a traditional family. In essence, the two decisions demonstrate a changing attitude towards the status of group homes and a greater acceptance of their presence in a low-density residential district.

The decision of Charlottetown v. Charlottetown Association for Residential Services[129] also illustrates the growing judicial acceptance of group homes as compatible forms of development in residential areas. The Association established a group home in an area zoned as a single or two family residential district. A "one family dwelling" was described as "a detached building having independent exterior walls and designed or used exclusively for residence purposes by not more than one family."[130] The word "family" was not defined. In addition, the City had designated an area of the city as a multi-family zone, in which group houses were permitted uses. The term "group houses" was not defined.[131]

Six moderately retarded adults lived in the home. They were placed there by older parents who could no longer care for them. The Association, a non-profit organization, received a daily allowance from the Department of Social Services to cover operating costs. The inhabitants did not receive professional care. Evidence established that these people lived an everyday existence.[132]

The City sought an injunction to stop the Association from operating the home in the residential district. Lawyers for the City argued that the home was actually a health care facility, and thus forbidden from operating in a single family detached home area.[133]

The Prince Edward Island Provincial Court refused to grant the injunction, dismissing the City's argument that the home was a commercial use.[134] Like the Ontario Court of Appeal in Brown Camps II, the Court in Charlottetown Association classified the group home as a non-commercial use of land. In support of this finding, the Court cited the following facts: the home was operated on a non-profit basis by a charitable organization; it was distinguishable from a boarding house where the tenants paid the owner for room, board, and housekeeping services;[135] and the occupants lived as a household, going to work everyday, preparing their own meals, and sharing household chores.[136] The Court held that, in light of these facts, the occupants were a family in the functional sense of that word.[137] In making this determination, the Court accepted the following definition of "family":[138]

> The word family has several meanings. Its primary meaning is the collective body of persons who live in one house under one head or management. Its secondary meaning is those who are of the same lineage or descend from one common progenitor. Unless the context manifests a different intention, the word "family" is usually construed in its primary sense.

The City of Charlottetown had not defined "family"; thus, a sympathetic court was free to interpret the word in a manner which forwarded the cause of the sponsors and the occupants of the group home.

Perhaps the most interesting aspect of the Court's judgment was its views of the purposes of single family zoning by-laws. The Court indicated that it considered the protection of the residential character of the neighbourhood as the most important goal of single family zoning by-laws.[139] In the Court's opinion, the group home did not detract from the residential character of the neighbourhood since the house did not look like an institution and was used for residential purposes, the occupants acted as a family, and the home had not caused inconvenience to the neighbours or a drop in property values.[140] The Court concluded that the objective of the by-law had not been frustrated by reason of the operation of the group home.[141]

One other recent decision, Re Hutterian Brethren Church of Eagle Creek Inc. and Rural Municipality of Eagle Creek,[142] has dealt with the construction of residential land use by-laws. The relevant zoning by-law limited permitted uses in an agricultural district to agricultural pursuits and necessary accessory buildings, described as "buildings, structures or uses accessory to and located on the same site with the main use, including single family dwellings accessory to the principal agricultural use."[143] The definition section of the by-law stated that a single family dwelling was "a detached building consisting of one dwelling unit as herein defined, and occupied or intended to be occupied as a permanent home or residence of one family, but shall not include a trailer coach ..."[144] The regulations annexed to the by-law permitted the construction of not more than two single family dwellings on any one agricultural holding.[145] The same regulations delegated a discretionary power to the Council of Eagle Creek, permitting it to authorize the construction of additional buildings, if such buildings were necessary to the operation of the farm.[146]

The Hutterites purchased approximately 4000 acres of land in the municipality, and applied for a development permit to build residences, a communal kitchen, a laundry, a slaughterhouse, a church, and a school.[147] The Council denied the application on the grounds that the school was not a permitted use, the laundry and slaughterhouse were partially non-agricultural uses, and the kitchen and residences did not meet the by-law's definition of single family dwellings. The Council also denied the Hutterites a permit for the church.[148]

The Hutterites appealed to the local zoning appeal board, and then, after losing the appeal, to the Planning Appeal Board.[149] Following the decision of the Planning Appeal Board, the Hutterites asked the Saskatchewan Court of Appeal, by way of a stated case, to interpret the word "dwelling", while the Planning Appeal Board asked the Court to determine whether it had erred in finding that the kitchen and the laundry were permitted accessory uses.[150]

The majority of the Saskatchewan Court of Appeal decided that "dwellings" should be interpreted as including all types of living quarters necessary to the operation of an agricultural holding.[151] The Court also stated that the Planning Appeal Board had been correct in its findings, and that the kitchen and slaughterhouse were accessory buildings.[152]

Central to the Court's judgment was its use of the rules of statutory construction in a manner which both upheld the validity of the zoning by-law and protected the religious freedoms of the Hutterites. The Court first noted that s.60 of the Planning and Development Act, R.S.S. 1978, c.173 gave the Council the authority to enact land use regulations for the purpose of providing for the amenity of an area and for the health, safety, and general welfare of the municipality's residents. It then cited a prior decision of the Saskatchewan Division Court, R. v. Hutterian Brethren Inc.[153], in which the divisional court judge had stated that the establishment of a Hutterite colony in an agricultural district neither detracted from the amenities of the area nor endangered the health, safety, or general welfare of the residents.[154] In a third passage, the Saskatchewan Court of Appeal further noted that the doctrine of unreasonableness was still available as a means of reviewing municipal by-laws, and it was therefore incumbent upon the judiciary to construe a land use by-law in such a manner as to neither cause the municipality to exceed the express limits of its powers nor render the by-law's provisions unreasonable.[155] Finally, the Court of Appeal discussed the religious significance of the Hutterite's communal life, noting that the common law prohibited the use of restrictive covenants and zoning ordinances to achieve racial or religious segregation, and that s.2 of the recently proclaimed Canadian Charter of Rights and Freedoms similarly protected these freedoms.[156] In summarizing its approach to the construction of the land use by-law, the Court stated:[157]

> In light of the foregoing, it is obvious that our law does not permit municipal by-laws to be used as instruments of intolerance or oppression. All citizens must have an equal opportunity to live the life they can and want to live, without being hindered by discriminatory practices, as long as their actions are in keeping with their obligations as responsible members of society. It is not the function of municipal councils through the medium of zoning by-laws, or otherwise, to strive to forestall the practices of a particular faith.

Having made these observations, the Saskatchewan Court of Appeal interpreted the word "dwelling" in the land use by-law. It discussed the predominant form of land use in the district, stating that the owners of any large-scale farming operation would require additional workers and additional buildings to house these extra people.[158] The Court inferred from the agricultural nature of the community that the Council could not have intended to restrict the construction of additional buildings to single family dwellings, given the normal requirements of farming operations in the district.[159] After underlining once more the necessity of construing a by-law so as not lead to its invalidity, the Court stated that "dwelling" should be given its popular meaning which would include any form of dwelling required for the conduct of a farming operation.[160]

From this judgment and those concerning the application of single family zoning by-laws to group homes, it appears that Canadian courts are prepared to construe single family zoning by-laws in a manner which safeguards individual liberties and allows non-traditional family groups access into low-density residential areas. In particular, the recent decisions of Charlottetown v. Charlottetown Association for Residential Services[161] and Re Hutterian Brethren Church of Eagle Creek[162] show that some Canadian courts have adopted the view that single family zoning by-laws help protect the physical attributes of a low-density residential area only and should not be used as a means of excluding minority groups. As long as the would-be residents use their property in a manner compatible with the overall pattern of land use in the district, the precise form of their living arrangements do not have to fall strictly within the terms of the relevant land use by-law.

While these recent decisions on single family zoning by-laws indicate a certain judicial sympathy with the problems faced by the mentally and physically disabled and religious minorities, it would be premature to state that all courts will construe such land use by-laws in an equally lenient manner. As the decision in Brown Camps I indicates, some members of the judiciary may adopt a very literal interpretation of single family zoning by-laws, and insist that prospective residents comply strictly with the terms of the by-law. Moreover, even courts sympathetic to the claims of some minority groups may be less inclined to leniently construe a land use by-law when other non-traditional families challenge its validity in order to gain access to a low-density residential area. For example, it has become increasingly common to attempt to place half-way houses, minimum security detention centres, and detoxification centres in residential districts. The individuals inhabiting these homes do not have a history of being protected by the common law or human rights legislation like religious minorities. They do not garner the popular support that the mentally and physically disabled attract. Half-way houses and the like are generally perceived as disruptive forms of residential development and are commonly thought to decrease surrounding property values. Given the highly controversial nature of this form of group housing, it is likely that some Canadian courts will adopt a stricter interpretation of single family zoning by-laws and defer to the judgment of the municipal council and its professional planners.

2. Doctrines of Discrimination and Bad Faith

Canadian courts have also employed administrative law doctrines of discrimination and bad faith to review the validity of municipal land use regulations affecting individual liberties.[162A] At first glance, the doctrine of discrimination would appear particularly relevant to the issue of exclusionary zoning. As developed through decisions in the area of land use planning, however, this doctrine is presently of limited application. In order to invalidate a land use regulation as being discriminatory, a court requires proof of the planning authority's intention to treat two groups differently for irrelevant or extraneous planning considerations. Therefore, the courts frequently link discrimination with bad faith, a concept of administrative law which implies that the administrative body has exercised its statutory powers for malicious, fraudulent, or improper purposes. The dual requirements that a planning authority act for improper or irrelevant planning considerations and with intent to discriminate means that the courts will rarely invalidate such planning devices as low density residential zoning, development standards, subdivision exactions, and discretionary residential zoning.

One of the more important judicial comments on discrimination in the planning context is that of Mr. Justice Judson in the Supreme Court of Canada decision of Township of Scarborough v. Bondi.[163] Commenting upon an earlier definition of discriminatory municipal action contained in the decision of Forst v. Toronto,[164] his Lordship stated:[165]

> ... I share the doubt expressed by the learned Chief Justice whether it [the definition] can ever afford a guide in dealing with a restrictive or zoning by-law. The mere delimitation of the boundaries of the area affected by such a by-law involves an element of discrimination. On one side of an arbitrary line an owner may be prevented from doing something with his property which another owner, on the other side of the line with a property which corresponds in all respects except location, is free to do. Moreover, within the area itself, mathematical identity of conditions does not always exist. All lots are not necessarily of the same frontage or depth. The configuration of the land and the shape of the lots may vary. Some lots may have frontage on two streets. These are only some of the considerations which may justify a municipality in enacting these by-laws in exercising a certain amount of discretion.

Although this decision concerned a land use by-law which affected two landowners' property rights, it nevertheless illustrates the extent to which Canadian courts have accepted the inherent discriminatory effects of land use regulation.

In the recent decision of Lacewood Development Company v. City of Halifax and Provincial Planning Appeal Board,[166] the Nova Scotia Court of Appeal reviewed the various meanings that the Canadian courts have given to the concept of discrimination, and discussed its application to the review of planning actions. The Court of Appeal referred to the early decision of City of Halifax v. Read, in which the Supreme Court of Canada stated that a by-law having uniform application was one importing a "lack of arbitrary or unjust discrimination" and not merely "precise arithmetical equality."[167] The Nova Scotia Court of Appeal also cited Township of Scarborough v. Bondi[168] to support its argument that a land use by-law is not necessarily discriminatory if it affects two individuals unequally.[169] The Court of Appeal stated:[170]

> In my respectful opinion Bondi lays at rest the claim that a court may presume to interfere with an otherwise valid enactment of a municipality or, in this case, of a planning appeal board, merely because it treats one person differently from another. Undoubtedly "arbitrary or unjust discrimination"... can invalidate a by-law, but such discrimination I conceive occurs only when a by-law favouring or hurting an individual has been passed in bad faith for that purpose and without regard to the public interest.

After summarizing the applicable case law, the Court of Appeal offered its own definition of discrimination:[171]

> 1. The by-law must discriminate in fact. To use the words of Middleton J. in the "classic definition", by-laws discriminate if they "give permission to one and refuse it to another."
>
> 2. The factual discrimination must be carried out with the improper motive of favouring or

> hurting one individual and without regard to the public interest.

In light of this definition, Canadian courts will likely find that a land use by-law is discriminatory only if there is proof that a planning authority actively discriminated against a certain landowner or individual for racial, ethnic, or religious motivations or in response to the prejudices of the local community.

Four recent decisions illustrate the circumstances where Canadian courts are prepared to strike down exclusionary land use regulations as discriminatory, and hence ultra vires the power of the municipal planning authority. The first pair of cases, H.G. Winton Ltd. and Zoroastian Society of Ontario v. Borough of North York[172] and R. v. Hutterian Vanguard Brethren Inc.,[173] provide examples of situations where municipal councils attempted to exclude certain minority groups for reasons based on religious and ethnic prejudice. The second pair of cases, Mueller v. Tiny[174] and Horseshoe Valley Ltd. v. Township of Medonte,[175] show how Canadian courts have dealt with land use by-laws affecting the liberties of lower income households.

In H.G. Winton and Zoroastian Society of Ontario v. Borough of North York the Zoroastian Society wished to purchase a mansion formerly owned by Mazo de la Roche.[176] The Society intended to turn the mansion into a Zoroastian temple. The land was zoned R-3, which meant that institutional buildings, such as churches, were permitted forms of development. The Society requested written confirmation that it could use the house as a temple; this confirmation was given to them by the building commissioner.[177] Within two weeks of confirmation the local council enacted a by-law rezoning a four-block area to preclude all forms of institutional use.[178] The Society's land was among the lots affected by the rezoning.[179]

The petition of a ratepayers' association showed that the community feared the influx of members of a religious sect.[180] Members of the local council also made statements showing that they did not want the Society in the community.[181] The City had never previously expressed concern over its policy towards institutional forms of development. Nor had it worried about the preservation of an historic home until the Society started to build its temple.[182] The council also failed to observe procedural requirements, such as holding a public meeting and granting the Society an opportunity to respond to the amendment.[183]

On the basis of these facts, the Court held the council's actions to be discriminatory and made in bad faith.[184] Distinguishing Township of Scarborough v. Bondi,[185] the Court stated that "... no planning purpose had been shown to explain, let alone justify the selection of a single spot in the borough as the subject of this amendatory zoning by-law. There is no rhyme nor reason, in a planning sense, for it."[186]

In R. v. Vanguard Hutterian Brethren Inc., the council of a rural Saskatchewan municipality sought to block the establishment of a Hutterite colony by amending a zoning by-law to restrict the number of family residences permitted on a quarter section of land.[187] The council passed two resolutions: one authorizing the preparation of the proposed amendment, and the other requiring that written permission be obtained from the council prior to the commencement of any development during the period that the proposed by-law was under discussion.[188] The Hutterites applied for permission to build a colony, which was refused.[189] Other individuals had successfully applied for development permission during the same period.[190]

The Saskatchewan Divisional Court stated that the actions of the council demonstrated bad faith.[191] In the Court's opinion, this bad faith was evidenced by discussions among municipal councillors as to the best method of preventing the entry of the Hutterites into the community, successful development applications by other individuals during the same period, and the evidence of the planner indicating that the council wanted to control the amount of land used by the Hutterites.[192] According to the Court, the council had exceeded its jurisdiction by using its planning powers to exclude a group of individuals whose religion and lifestyle were different from those of the majority.[193]

In both the H.G. Winton and Zoroastian Society of Ontario[194] and R v. Vanguard Hutterian Brethren[195] the courts were faced with situations where municipal councils had acted precipitously to block the entrance of a minority group into their communities. In both cases, circumstantial evidence showed that the land use regulations were expressly designed to exclude a religious sect and were drawn up to accommodate the fears and prejudices of the long-time residents. The planning considerations put forward by the municipal councils to justify their actions were, at most, secondary considerations augmenting, or even disguising, the primary discriminatory motive.

In contrast, the decisions of Mueller v. Tiny[196] and Horseshoe Valley Ltd. v. Township of Medonte[197] dealt with the validity of land use by-laws which adversely affected the interests of a class of individuals, but which did not appear to be motivated by any discriminatory purposes. Furthermore, unlike the first pair of cases which concerned specific acts of religious discrimination, these cases discuss by-laws whose provisions applied equally to all existing and prospective residents and were not enacted to block an isolated application for a development permit.

In Mueller v. Tiny[198] the Ontario Divisional Court struck down a by-law in which the permitted uses in seasonal residential zones were restricted to "seasonal dwelling units."[199] The by-law defined a seasonal dwelling unit as "a dwelling for vacation and recreational purposes used by a person who maintains and regularly resides in a permanent dwelling at another location."[200] The Court declared the by-law ultra vires the municipality for two reasons: the definition of seasonal dwelling was uncertain; and the municipality had exceeded its jurisdiction by regulating the type of person who could live in a seasonal dwelling.[201] The Court accepted the argument, advanced by the plaintiff, that the by-law discriminated against people who could not afford to maintain two homes.[202] The Court offered few reasons for its conclusion. However, its decision is one of the few where a by-law potentially discriminating against lower income households has been invalidated by a Canadian court.

In Horsehoe Valley Ltd. v. Township of Medonte,[203] the plaintiff challenged the validity of a by-law permitting seasonal dwelling units, trailer parks, and accessory buildings as the only forms of development in a ski resort located in the Township. Seasonal dwelling units were defined as "houses constructed and used as a secondary place of residence for seasonal vacations and recreational purposes and not as a principal place of residence."[204]

The Ontario High Court upheld the validity of the by-law, distinguishing Mueller v. Tiny[205] on the basis that the by-law in the latter case potentially singled out middle and lower income individuals for different treatment than that accorded wealthier classes.[206] The Court held that Medonte's by-law, by its wording, dealt only with physical uses of land.[207] While admitting that the word "secondary" may have created a distinction between affluent skiers and other individuals, the Court did not consider this a "distinction in principle."[208] Rather, the Court thought that the restriction reflected valid planning considerations, such as a concern for the financing and provision of schools, public facilities, utility services, and infrastructure.[209] Like the courts in Township of Scarborough v. Bondi[210] and Lacewood

Development Company v. City of Halifax,[211] the Ontario High Court accepted the inherent discrimination of land use planning. According to the Court:[212]

> There is always an element of discrimination in the matter of zoning and discrimination which in law must be such as is directed only to particular persons or groups of persons. If the by-law applies the same way to all persons within the zone, it is not discriminatory.

Absent proof that the municipality had intended to exclude a class of persons because of characteristics associated with them, the Ontario High Court was unwilling to declare the by-law invalid simply because it effectively denied this class of persons the opportunity to move into the district.

Mueller v. Tiny[213] and Horseshoe Valley Ltd. v. Township of Medonte[214] appear to be the only two decisions in which Canadian courts have expressly addressed the subject of exclusionary land use regulations affecting the liberties of lower income households. In Mueller v. Tiny,[215] the Ontario Divisional Court was faced with a by-law which, on its face, was discriminatory since it implied that only those people having principal residences elsewhere could own seasonal dwellings. Because seasonal residential development was a predominant form of land use, the Township's by-law, if construed literally, excluded a significant portion of the population from living there.

In contrast, the by-law in Horseshoe Valley Ltd. v. Township of Medonte,[216] which potentially had a similar discriminatory effect, was worded more carefully and did not regulate the type of person who could live in seasonal dwellings. This semantic difference helped to explain the differing results of the two decisions.

In Horseshoe Valley Ltd. v. Township of Medonte,[217] however, the Ontario High Court was more willing to examine the planning reasons advanced by the Township's lawyers and to accept the argument that the by-law's potentially discriminatory effect was an inadvertent result of the Township's attempts to regulate land development. Although the Court did not expressly address this point, it would seem that Medonte was a comparatively small township with a limited population. Consequently, it would have a small tax base from which to finance the construction of public facilities. The by-law, by limiting development in the ski resort to seasonal dwellings, helped to restrict the number of potential permanent residents in the community and balance the Township's growth to its financial resources.

The Ontario High court decision in Horseshoe Valley Ltd. v. Township of Medonte[218] is important because it is one of the few decisions where Canadian courts have been called upon to decide whether a land use by-law is discriminatory simply because it may effectively deny some people the opportunity of moving into a residential district. The Ontario High Court weighed the planning considerations advanced by the Township against the discriminatory effect of the by-law, and decided that the Township's actions were valid. The Court stated categorically that a by-law that applied equally to all individuals could not be discriminatory, and that, in order for a by-law to be discriminatory, there must be proof that it was designed to affect the rights and liberties of a particular class of individuals.

Based upon the reasoning of the Ontario High Court, few of the exclusionary land use regulations discussed in Part A of this Chapter would be discriminatory. Land use regulations tailoring urban growth to a community's fiscal resources, creating residential districts composed of one or more types of housing, establishing development standards, and imposing conditions on the subdivision of land apply equally to all current and potential residents of a community. These common forms of land use regulations are based upon widely-recognized planning principles and are designed to regulate land use for the ultimate benefit of all community members. Any discriminatory effect generally arises not because of the municipality's desire to exclude a certain class of individual, but from the inability of some persons to afford the higher-priced housing resulting from these land use regulations. In the light of the reasoning of Horseshoe Valley Ltd. v. Township of Medonte[219] it would seem that these land use regulations would almost always be valid unless there was evidence, such as was present in R v. Vanguard Hutterian Brethren Inc.,[220] that they had been enacted for improper or irrelevant motives.

3. Doctrine of Unreasonableness

The doctrine of unreasonableness has recently resurfaced as a third means of reviewing the validity of exclusionary land use regulations. It provides an alternative to the more common bases of judicial review since it potentially allows courts to question the wisdom of certain regulations and to substitute their opinion of what constitutes equitable and fair treatment for that of the municipality and its planners.

The Supreme Court of Canada decision of Bell v. Regina[221] is the leading judgment on the application of the doctrine of unreasonableness to the review of municipal land use regulations.

In Bell v. Regina, the land use by-law defined "family" in the following manner:[222]

> 'family' means a group of two or more persons living together and inter-related by bonds of consanguinity, marriage or legal adoption, occupying a dwelling unit, and shall include the following:
>
> (a) Non-paying guests and domestic servants;
>
> (b) A property owner living alone except for two other persons not related;
>
> (c) Not more than three foster children under the care of a children's aid society approved by the Lieutenant Governor in Council under the Child Welfare Act, 1965.

Douglas Bell and two friends rented a house. They were charged with having violated the by-law, and were convicted by the Justice of the Peace.[223]

Bell appealed the conviction to the County Court, where his conviction was overturned.[224] The municipality appealed this decision to the Ontario Divisional Court, which declared the by-law ultra vires the municipality and quashed the conviction.[225] The municipality launched a second appeal to the Ontario Court of Appeal, which upheld the validity of the by-law and restored the original conviction.[226] Douglas Bell launched a further appeal to the Supreme Court of Canada. The Supreme Court declared the zoning by-law ultra vires the municipality.[227]

Mr. Justice Spence, writing the majority judgment, apparently declared the by-law ultra vires the municipality for two reasons: first, because the municipality had exceeded the jurisdiction granted to it by the enabling legislation;[228] and second, because the by-law represented an unreasonable exercise of the municipality's power.[229]

His Lordship first examined the wording of s.35(1) of the Planning Act, R.S.O. 1970, c.349, noting that the legislation only enabled the municipality to control land use.[230] By restricting the occupation of dwellings to "families", and defining "families" by reference to blood, legal or marital tie, the municipality had dictated the type of person who could live in the community.[231] Mr. Justice Spence labelled this use of the planning power as "land zoning by people zoning", and beyond the scope of power expressly delegated to the municipality by the provincial legislature.[232]

Mr. Justice Spence also stated that the land use by-law represented an unreasonable exercise of the municipality's planning power.[233] In coming to this conclusion, Mr. Justice Spence adopted a definition of unreasonable administrative action first advanced by Lord Russell in Kruse v. Johnson:[234]

> But unreasonable in what sense? If, for instance [the by-laws] were found to be partial and unequal in their operation as between different classes; if they were manifestly unjust; if they involved such

> oppressive and gratuitous interference with the right of those subject to them as could find no justification in the minds of reasonable men, the Court might well say "Parliament never intended to give authority to make such rules: they are unreasonable and ultra vires."

His Lordship then continued on to state that, in the light of its many potentially inequitable applications, the by-law's definition of "family" represented an oppressive and gratuitous interference with individual rights and liberties.[235] By stressing the final portion of Lord Russell's definition of unreasonable administrative action, Mr. Justice Spence implied that the doctrine of unreasonableness constituted a separate means of reviewing municipal land use regulations.

The Supreme Court's revitalization of the doctrine of unreasonableness is the most significant aspect of the Court's decision. Prior to Bell v. Regina,[236] the Canadian courts appeared to have discarded substantive review of municipal by-laws on the basis of the reasonableness of their provisions.[237] In order to review the fairness and justice of municipal actions, the courts invoked doctrines of bad faith and discrimination.[238] Indeed, in the lower court decision of R. v. Bell, the Ontario Court of Appeal stated that unreasonableness was to be equated with bad faith, discrimination, and bias; it had no independent existence as a doctrine of judicial review.[239] The reason for the general reluctance to employ the doctrine of unreasonableness was obvious: there was too great an opportunity for the judiciary to interfere with the policy decisions of municipal councils. In Bell v. Regina, the Supreme Court of Canada admitted the force of this argument,[240] yet preferred to retain the doctrine of unreasonableness as a residual method of protecting the individual from oppressive and gratuitous interference with this rights.

Unfortunately, the Supreme Court of Canada provided little indication of what it considered to be the oppressive and gratuitous interference in the instant case. Mr. Justice Spence cited with approval the statement of Mr. Justice Estey of the Ontario Divisional Court outlining the possible economic hardships stemming from a literal interpretation of the by-law.[241] His Lordship appeared, at one point in his judgment, to equate such inequitable effects with oppressive and gratuitous interference on the part of the municipal council.[242] At the same time, his Lordship also implied that the simple act of zoning by reference to the relationship of the occupants of single detached homes was an unreasonable use of the municipal council's delegated powers.[243] This ambiguity has lead one commentator to list three aspects of the by-law which may have influenced the Supreme Court's interpretation: the irrationality of allowing numerous related individuals to live in a single house while prohibiting its occupation by more than two unrelated people; the restriction upon common law relationships; and the resultant economic hardships for individuals not falling within the by-law's definition of family.[244] However, it is impossible to state categorically whether the Supreme Court of Canada gave one of these factors more weight than the other. The later decisions of the planning appeal boards and the courts have only served to further confuse the meaning of the Supreme Court of Canada's decision.

In two cases, Re City of Toronto By-law 413-75[245] and Re Hamilton-Wentworth Planning Area Official Plan Amendments,[246] the Ontario Municipal Board interpreted Bell v. Regina[247] as having decided that zoning by reference to personal characteristics is ultra vires the municipality. In the former case, a city by-law created a special zone for use as a senior citizen home. The by-law described the housing project as a development for the use of senior citizens and individuals and couples over the age of fifty-five years.[248] In a short judgment, the Board refused to ratify the by-law because it was an example of "people zoning".[249] No reasons were offered by the Board for its characterization of the by-law. In the latter case, the town of Hamilton-Wentworth applied for a site-specific amendment to the official plan in order to construct a senior citizen's home in a predominantly rural area.[250] Although the Board refused the application for other reasons, it indicated that it would have been willing to entertain arguments concerning the distinction between people zoning and land use control if these reasons had been insufficient.[251]

Stanley Makuch, in Canadian Municipal and Planning Law, has suggested that the superficial distinction between people zoning and land use regulation is not the correct rationale of Bell v. Regina.[252] Although the Supreme Court of Canada's decision did state that "people zoning" was ultra vires the municipality, it also held that the municipality had exceeded its jurisdiction by interfering with individual liberties to an unconscionable extent.[253] As well, as Makuch notes, Mr. Justice Spence's judgment also recognized the potential inequities stemming from the by-law's definition of "family".[254] The Supreme Court's recognition of these possible inequities formed a part of its reasons for declaring the by-law an unreasonable exercise of the municipality's planning power.

In a third case, Smith v. Township of Tiny,[255] the Ontario High Court interpreted the Supreme Court of Canada's decision in Bell v. Regina.[256] as having rested upon the unreasonableness of the by-law rather than upon the distinction between people zoning and land use regulation.[257] Mr. Justice Robins of the Ontario High

Court argued that Bell v. Regina[258] had not invalidated all single family zoning by-laws, but only those creating similar types of inequities.[259]

The by-law under attack in Smith v. Township of Tiny was similar to the one in Bell v. Regina.[260] In Smith v. Township of Tiny the by-law described family as "one or more human beings related by blood or marriage, adoption, common law marriage or a group of not more than three human beings who need not be related by blood or marriage living together as a single housekeeping unit."[261] Unlike the by-law in the earlier case however, the Township of Tiny's by-law included common law relationships within its definition of a traditional family, permitted a single individual to be considered a family, and did not require unrelated individuals to own the house in which they lived. Four taxpayers challenged the by-law's validity, arguing that the Township had exceeded its jurisdiction.[262]

The Ontario High Court upheld the validity of the by-law, distinguishing the earlier case on the basis of the differences in the wording of the two by-laws.[263] According to Mr. Justice Robins, the Supreme Court's decision should be understood in its context.[264] His Lordship noted that the by-law in the earlier case, if interpreted strictly, created numerous inequitable results.[265] Here, the plaintiff had not alleged that the Township's by-law produced an equally incongruous and inequitable effect.[266] The Township's by-law encompassed most personal relationships, and therefore did not obviously exclude one particular type of individual.[264] His Lordship concluded that single family zoning by-laws were valid planning techniques so long as they did not exclude recognizable classes of persons.[268] Leave to appeal to the Supreme Court of Canada was dismissed, an indication that the Supreme Court of Canada did not consider that its earlier decision had invalidated all single family zoning by-laws.[269]

Finally, in the recent decision of Re Hutterian Brethren Church of Eagle Creek Inc. and Rural Municipality of Eagle Creek,[270] the Saskatchewan Court of Appeal suggested that it would have found a land use regulation excluding a religious community to be an unreasonable exercise of a municipality's planning power, had it not already held the regulation invalid on other grounds.[271]

Ultimately, the Supreme Court of Canada decision in Bell v. Regina[272] may provide Canadian courts with a means of reviewing the validity of planning techniques which either have remained unchallenged or whose legitimacy has been accepted by the courts. Such planning techniques would possibly include exclusive residential zoning, growth controls, excessive development standards, and subdivision exactions. The exclusionary effect of these types of land use regulations stems not from any overtly discriminatory purpose, but from the inability of certain individuals to afford the costly housing generated by excessive development standards and onerous subdivision conditions. Normally, such regulations would remain unchallenged, or if challenged, would be upheld by the courts. However, under appropriate circumstances, the courts could be persuaded that these regulations were unreasonable exercises of a municipality's planning power. For example, some American courts, using a different method of analysis, have invalidated land use regulations blocking the access of lower and middle income households from developing communities where there are significant employment opportunities.[273] In such cases, American courts have found that the community's fiscal concerns did not justify the social and economic inequities created by planning measures such as staged growth controls and excessive development standards. If the Supreme Court decision of Bell v. Regina[274] is read in its broadest sense, it is possible that a Canadian court would overturn land use regulations that deprived certain classes of individuals the opportunity to locate near areas of economic growth.

Similarly, land use regulations creating substantive and procedural restrictions on specialized residential development may also be subject to review under the doctrine of unreasonableness. Again, these type of regulations are normally justified by worries over the controversial nature of specialized residential development and by a desire to restrict demand for additional public facilities. Previously, such factors may have been considered to be legitimate planning concerns. With the increasing recognition and acceptance of the claims of group home sponsors, the planning factors which have justified municipalities classifying specialized housing as a discretionary form of development may no longer seem quite so compelling. It is entirely possible that a sympathetic court could declare such actions invalid, arguing that the discretionary classification and the accompanying substantive and procedural roadblocks represent an unconscionable interference with the rights of the disabled, the aged, and the underprivileged.

Finally, the doctrine of unreasonableness provides an alternative means of reviewing single family zoning by-laws permitting only a limited number of unrelated individuals to live in single family detached homes. Previously Canadian courts have preferred to fit groups of unrelated persons, usually the mentally and physically disabled, into a very broad definition of "family". This form of analysis evades tackling the central issue of why municipalities restrict the number of unrelated persons who can live in one dwelling, but allow an unlimited number of related individuals to live together. This distinction appears to be an arbitrary one, and is not easily justified by the argument that placing restrictions on the number of unrelated people serves to regulate population density in a residential district. Given that single family zoning by-laws significantly restrict the freedom of some individuals to move into a given neighbourhood and to choose the people with whom they plan to live, it would seem that these by-laws can also be labelled "unreasonable".

C. Conclusion

There are few Canadian decisions on the subject of exclusionary zoning. The majority of these decisions concentrate on the issue of whether the inhabitants of group homes and the members of religious communities constitute a "family" or live in a "dwelling", and therefore meet the requirements of a given land use by-law. The validity of single family zoning by-laws has only be questioned in two cases, Bell v. Regina[275] and Smith v. Township of Tiny.[276] In the former decision, the Supreme Court of Canada declared a single family zoning by-law invalid because it potentially excluded a wide variety of people from living in desirable residential districts. However, in the latter decision, the Ontario High Court upheld another single family zoning by-law that permitted a greater range of individuals to live in districts of single detached and semi-detached homes. Neither case expressly addressed the question of whether a municipality could validly limit the number of unrelated people living in one house while failing to place the same restrictions on related individuals.

There are only two decisions which deal with the validity of the other forms of exclusionary zoning. In Mueller v. Tiny,[277] the Ontario High Court invalidated a by-law restricting development to one type of housing because it described land use in terms of the personal characteristics of the inhabitants. In Horseshoe Valley Ltd. v. Township of Medonte,[278] however, the Ontario High Court upheld another by-law limiting types of development to seasonal dwellings on the basis that this by-law was not obviously aimed at excluding specific classes of individuals. From this decision, and others such as R. v. Vanguard Hutterian Brethren Inc.[279] and H.G. Winton Ltd. and Zoroastian Society of Ontario v. Borough of North York,[280] it seems that Canadian courts require affirmative proof of a discriminatory or irrelevant purpose before they will invalidate most exclusionary zoning by-laws.

ENDNOTES

1 For example, s.69(2) of the Planning Act, R.S.A. 1980, c.P-9.

2 City of Edmonton, Land Use By-Law, s.110-260.

3 *Id*.

4 *Id*.

5 For a general discussion, see R.J. Johnston, *Residential Segregation The State and Constitutional Conflict* (1982) Chapters I-III.

6 A.B. Shlay and P.H. Rossi, "Keeping up the neighbourhood; establishing the net effects of zoning," (1981) *American Sociological Review* 703 at 705.

7 *Id*. at 705.

8 *Id*.

9 For current information on the taxing powers of municipal governments see G.V. LaForest, *The Allocation of Taxing Power Under the Canadian Constitution* (1981); Resource Task Force on Constitutional Reform, *Municipal Government in a New Canadian Federal System* (1982).

10 City of Edmonton, *Submissions to the Provincial-Municipal Finance Council, Submission Number Two; Public Service Delivery Responsibilities* (1976) 21-29.

11 Federal/Provincial Task Force on Supply and Price of Serviced Residential Land, *Down to Earth: The Report of the Federal/Provincial Task Force on the Supply and Price of Serviced Residential Land*, v.II (1978) 138.

12 *Id*.

13 For a general discussion, see R.J. Johnston, *supra* n. 5 at 34-50.

14 The Planning Act, R.S.A. 1980, c.P-9 is typical of provincial planning legislation. The public may question the contents of regional and municipal plans prior to their adoption by council (ss.48(1); 62). Citizens may appear before the Planning Appeal

Board when a municipal councils appeals provisions of a regional plan (s.58(d)). Persons affected by a decision of a development control officer may appeal the decision to the Development Appeal Board (s.85(1)).

15 The authors of the Report of the Federal/Provincial Task Force on the Supply and Price of Serviced Residential Land have documented a number of instances where community groups successfully fought the construction of multi-family residential development. In one case, that of a development project sponsored by the Cadillac Fairview Corporation, the residents of the Bedford Glenn Community opposed the proposed construction of 593 rental-unit development. The final project consisted of 205 condominium units, which represented a reduction in density of 65 per cent. The community resistance also caused a delay of seven years between the initial projected date of completion and final date of approval. This example and others can be found in v.II, 143-157.

16 Id., v.I, 51.

17 The following studies and articles have examined the socio-economic effects of zoning: David E. Dowall, "The Effects of Land Use and Environmental Regulations on Housing Cost," in Montgomery and Marshall, eds., Housing Policy for the 1980's (1980) 113 at 120-22; Andryez Derkowski, Costs in the Land Development Process (1976); Bernard J. Frieden, "The Exclusionary Effect of Growth Controls," in Bruce M. Johnson, ed., Resolving the Housing Crisis; Government Policy Decontrol and the Public Interest (1982) 19; Federal/Provincial Task Force on the Supply and Price of Serviced Residential Land, Down to Earth: The Report of the Federal/Provincial Task Force on the Supply and Price of Serviced Residential Land (1978); A.B. Shlay and P.H. Rossi, "Keeping up the neighbourhood; establishing the net effects of zoning" (1981) American Sociological Review 703; M. Neimen, "Zoning Policy, Income Clustering & Suburban Change, (1980) 61 Social Science Quarterly 666; Charles E. Zech "Fiscal Effects of Urban Zoning" (1980) 16:1 Urban Affairs Quarterly 49.

18 Michael A. Goldberg, The Housing Problem: A Real Crisis? A Primer on Housing Policies and Problems (1983) 82-83.

19 Id. at 83-84.

20 *Id*. at 61.

21 The Planning Act, R.S.A. 1980, c.P-9, s.69(3) (a), (b), (c), (o).

22 *Id*. s.145(1) (a)-(l).

23 The Planning Act, S.N.S. 1983, c.9, s.91(2)f.

24 The Planning and Development Act, R.S.S. 1983, c.P-13, s.111(b).

25 The Planning Act, R.S.A. 1980, c.P-9, s.92(1)(b)i-iv.

26 *Id*. s.95(a)(b)(c).

27 *Id*. s.95(c)ii.

28 The Planning Act, S.O. 1983, c.1, s.50(5) a-d.

29 Robert Anderson, *American Law of Zoning* (1976) 50.

30 *Id*. at 49-50.

31 Albert Hudec, "Municipal Exactions and the Subdivision Approval Process," (1980) 38 *U. of T.Fac.L.Rev*. 106 at 117-21.

32 Anderson, *American Law of Zoning*, *supra* n.29 at 49-50.

33 The Planning and Development Act, R.S.S. 1983, c.P-13, s.61(5)i allows municipalities to regulate the percentage of a subdivided parcel of land that may be built upon and the size of yards, courts and other open spaces.

34 Albert Hudec, "Municipal Exactions and the Subdivision Approval Process," *supra* n.31 at 117-21; John D. Johnston, Jr., "Constitutionality of Subdivision Exactions: The Quest for a Rationale," (1966-67) 52 *Cornell L. Quarterly*, 871 at 923.

35 Derkowski, *Costs in the Land Development Process* (1976) 21, 161.

36 *Id*.

37 *Id*. at 45, 137.

38 *Id*. at 69-71.

39 Id. at 108-119, 122-129.

40 The Report of the Federal/Provincial Task Force on the Supply and Price of Services Residential Land (1978).

41 Id., v.I at 32-35; v.II at 125.

42 Id., v.I at 35.

43 Id., v.I at 34-35.

44 Id., v.I at 35.

45 Michael A. Goldberg, The Housing Problem: A Real Crisis? supra n.18 at 83.

46 Township of Esquimalt, Zoning By-Law (rev. 1981), 4.

47 The Corporation of the Township of Saanich, Zoning By-Law 5225 (May, 1984) 12.

48 Id.

49 Id.

50 The City of Edmonton, Edmonton Land Use By-Law No.5996 (rev. January, 1983), s.9.1(19)-(29).

51 Id.

52 The Improvement District No.10, Land Use Order, s.1.2(21).

53 Id.

54 Linda M. Grady, "Single Family Zoning: Ramifications of State Court Rejection of Belle Terre on Use and Density Control," (1980) 32 Hastings Law Journal 1690.

55 Id. at 1690, 1715-1716.

56 Id. at 1710-1711.

57 Id. at 1711.

58 Id. at 1692-93.

59 Id. at 1693.

60 Id. at 1704.

61 City of Edmonton, Land Use By-Law No.5996, s.9.

62 The City of Calgary, Land Use By-Law No. 2 P80, s.11(1)a(i).

63 Id. s.11(1)a(iii).

64 The Municipal Act, R.S.O. 1980, c.302, s.230(1) describes group homes as residences "licensed or funded for the accommodation of three to ten persons, exclusive of staff, living under supervision in a single housekeeping unit and who, by reason of their emotional, mental, social or physical condition or legal status, require a group living arrangement for their well-being."

65 The City of Thunder Bay, Community Planning and Development Division, Group Homes Study; A Background Report and Policy Proposal (March, 1982) 41.

66 Id. at 39.

67 Id. at 17.

68 City of Victoria, By-Law No.   Schedule A (1983), 8.

69 Id., Pt. 1.2, s.1(m).

70 Id., s.1(o).

71 City of Calgary, Land Use By-Law No.2P80 (1980), s.4(102).

72 Id., ss.21, 22.

73 Id., s.10(4).

74 Id., ss.12, 12(1)a.

75 Detailed discussions of the arguments supporting the placement of group homes in residential districts may be found in Tom Goodale and Sherry Wickmore, "Group Homes and Property Values in Residential Areas," (1979) 19 Plan Canada 154, and Allan M. Kaufman, "Group Homes for the Mentally Retarded: Do These Homes Qualify as Permitted Uses in Residential Areas Zoned for the Single Family?" (1982) Man.L.J. 43.

76 Goodale and Wickmore, "Group Homes and Property Values in Residential Areas," supra n.75 at 154-56.

77 The following arguments are found in Richard T. Kendall, *An Investigation of the Impacts of Group Homes on Residential Property Values in the Borough of Etibicoke* (Toronto, 1981).

78 *Id*. at 14-17.

79 *Id*. at 17.

80 *Id*. at 2.

81 The City of Thunder Bay, *Group Homes Study: A Background Report and Policy Proposal*, *supra* n.65 at 3.

82 *Id*.

83 *Id*. at 41.

84 *Id*. 17, 47.

85 Goodale and Wickmore, "Group Homes and Property Values in Residential Areas," *supra* n.75 at 162; Laurence W. Dolan and Julian Wolpert, *Long Term Neighbourhood Property Impacts of Group Homes for Mentally Retarded People* (1982).

86 Recent cases concerning community resistance to group homes include *Re Wilmot Restricted Area By-law 79-20* (1979) 11 O.M.B.R. 326; *Re North York Restricted Area By-Law 27-223* (1980) 11 O.M.B.R. 56; *Re Detob Services Inc.* v. *Timmins* (1980) 13 O.M.B.R. 108.

87 *Regina* v. *Heit* (1963) 40 D.L.R. (2d) 133, 41 C.R. 84, [1963] 2 O.R. 471; *Shaughnessy Heights Property Owners* v. *Children's Aid Society of Catholic Archdiocese of Vancouver* (1963) 42 W.W.R. 62 (B.C.S.C.); *Regina* v. *Brown Camps Ltd.* [1969] 2 O.R. 461 (C.A.) *City of Barrie* v. *Brown Camps Residential and Day Schools* (1973) 32 D.L.R. (3d) 671,[1974] 2 O.R. (2d) 337 (C.A.); *Charlottetown* v. *Charlottetown Association for Residential Services* (1979) 100 D.L.R. (3d) 614, 9 M.P.L.R. 91, 82 A.P.R. 81, 29 Nfld. and P.E.I.R. 81 (P.E.I.S.C.); *Bell* v. *Regina* [1979] 2 S.C.R. 212, (1979) 98 D.L.R. (3d) 255, 9 M.P.L.R. 103, 26 N.R. 457; *Re Hutterian Brethren Church of Eagle Creek Inc. and Rural Municipality of Eagle Creek* (1983) 21 M.P.L.R. 108.

88 *H.G. Winton Ltd. and Zoroastian Society of Ontario* v. *Borough of North York* (1978) 88 D.L.R. (3d) 733, 6 M.P.L.R. 1, (1978) 20 O.R. (2d) 737; *R.* v.

Vanguard Hutterian Brethren Inc. [1979] 6 W.W.R. 335, 5 Sask 376 (Div.Ct.).

89 *Mueller* v. *Tiny* (1976) 13 O.R. (2d) 626, 72 D.L.R. (3d) 28; *Horseshoe Valley Ltd.* v. *Township of Medonte* (1977) 79 D.L.R. (3d) 156, 16 O.R. (2d) 708 (H.C.).

90 *Re Guest and Weston* [1954] O.W.N. 271; *Regina* v. *Heit* [1963] 2 O.R. 471; *Re The Religious Hospitallers of St. Joseph and City of St. Catherines* [1946] 4 D.L.R. 737, [1946] O.R. 544.

91 *Re The Religious Hospitallers of St. Joseph and City of St. Catherines* [1946] 4 D.L.R. 737, [1946] O.R. 544.

92 *Re Guest and Weston* [1954] O.W.N. 271.

93 *Montreal* v. *Morgan*, [1920] 60 S.C.R. 393, 54 D.L.R. 165, 3 W.W.R. 36.

94 *Regina* v. *Heit* [1963] 40 D.L.R. (2d) 133, 2 O.R. 471, 41 C.R. 84 (C.A.).

95 *Id*.

96 *Id*. at 134.

97 *Id*. at 136.

98 *Id*.

99 (1963) 42 W.W.R. 62 (B.C.S.C.).

100 *Id*. at 63.

101 *Id*.

102 *Id*.

103 [1969] 2 O.R. 461 (C.A.).

104 (1973) 32 D.L.R. (3d) 671, [1974] (2d) 337 (C.A.).

105 [1969] 2 O.R. 461 (C.A.).

106 *Id*. at 462-464.

107 *Id*. at 462.

108 *Id*. at 466.

109 *Id*. at 464.

110 *Id*.

111 *Id*. at 465.

112 *Id*. at 466.

113 *Id*.

114 *Id*.

115 *Id*.

116 (1973) 32 D.L.R. (3d) 671, [1974] 2 O.R. (2d) 337 (C.A.).

117 [1974] 2 O.R. (2d) 337 at 340.

118 *Id*. at 341.

119 *Id*.

"Clinic" shall mean a building or part of a building used for the medical, dental, surgical or therapeutical treatment of persons but shall not include a hospital.

"Nursing home" shall mean any building in which persons are harboured, received or lodged and where, in addition to sleeping accommodation and meals, nursing, medical or similar care and treatment may be provided, but shall not include an hospital.

120 *Id*. at 342.

121 *Id*. at 343.

122 *Id*. at 339.

123 *Id*. at 344.

124 *Id*. at 342.

125 *Id*.

126 *Id*.

127 *Id*. at 343.

128 *Id*. at 344.

129 (1979) 100 D.L.R. (3d) 614, (1979) 9 M.P.L.R. 91, 82 APR 81 Nfld. and P.E.I.R. 81, (P.E.I.S.C.).

130 (1979) 9 M.P.L.R. 91 at 99.

131 *Id*. at 99.

132 *Id*. at 96-100.

133 *Id*. at 96, 98.

134 *Id*. at 98.

135 *Id*.

136 *Id*. at 99-100.

137 *Id*. at 100.

138 *Id*.

139 *Id*. at 101-102.

140 *Id*.

141 *Id*. at 103.

142 (1983) 21 M.P.L.R. 108.

143 *Id*. at 114.

144 *Id*.

145 *Id*.

146 *Id*.

147 *Id*. at 105.

148 *Id*.

149 *Id*. at 119.

150 *Id*.

151 *Id*. at 130.

152 *Id*. at 131.

153 [1979] 6 W.W.R. 335.

154 *Id*. at 351-352.

155 (1983) 21 M.P.L.R. 108 at 121-22.

156 _Id_. at 122-23. The decision of the Planning Appeal Board was given on April 12, 1982, just prior to the enactment of the Canadian Charter of Rights and Freedoms. There is no indication that Charter arguments were raised before the Saskatchewan Court of Appeal.

157 _Id_. at 125.

158 _Id_. at 129.

159 _Id_. at 130.

160 _Id_.

161 (1979) 9 M.P.L.R. 91.

162 (1983) 21 M.P.L.R. 108.

162A See cases discussed _infra_ n.172ff.

163 [1959] S.C.R. 444.

164 [1923] 54 D.L.R. 256.

165 [1959] S.C.R. 444 at 452.

166 (1976) 58 D.L.R. (3d) 383, (1975) 12 N.S.R. (2d) 692.

167 [1928] S.C.R. 605 at 612-13.

168 [1959] S.C.R. 444.

169 (1975) 12 N.S.R. (2d) 692, 705.

170 _Id_. at 706.

171 _Id_.

172 (1978) 88 D.L.R. (3d) 733, 6 M.P.L.R. 1, (1978) 20 O.R. (2d) 737,

173 [1979] 6 W.W.R. 335, 5 Sask. R. 376 (Div. Ct.).

174 (1976) 72 D.L.R. (3d) 28, 13 O.R. (2d) 626.

175 (1977) 79 D.L.R. (3d) 156, 16 O.R. (2d) 708 (H.C.).

176 (1978) 20 O.R. (2d) 737 at 738.

177 *Id*. at 739.

178 *Id*.

179 *Id*.

180 *Id*.

181 *Id*. at 743-744.

182 *Id*. at 742.

183 *Id*. at 746.

184 *Id*. at 744-745.

185 [1959] S.C.R. 444.

186 (1978) 20 O.R. (2d) 737 at 745.

187 [1979] 6 W.W.R. 335 at 343.

188 *Id*. at 338.

189 *Id*. at 342.

190 *Id*.

191 *Id*. at 341.

192 *Id*. at 342-344.

193 *Id*. at 353.

194 (1978) 20 O.R. (2d) 737.

195 [1979] 6 W.W.R. 335.

196 (1976) 13 O.R. (2d) 626.

197 (1977) 16 O.R. (2d) 709.

198 (1976) 13 O.R. (2d) 626.

199 *Id*. at 627.

200 *Id*.

201 *Id*. at 629-630.

202 *Id*. at 629.

203 (1977) 16 O.R. (2d) 709.

204 *Id*. at 710.

205 (1976) 13 O.R. (2d) 626.

206 (1977) 16 O.R. (2d) 709 at 711.

207 *Id*.

208 *Id*. at 712.

209 *Id*.

210 [1959] S.C.R. 444.

211 (1976) 58 D.L.R. (3d) 383, (1975) 12 N.S.R. (2d) 692.

212 (1977) 16 O.R. (2d) 709 at 711.

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217 *Id*.

218 *Id*.

219 *Id*.

220 [1979] 6 W.W.R. 335.

221 [1979] 2 S.C.R. 212, (1979) 98 D.L.R. (3d) 255, 9 M.P.L.R. 103, 26 N.R. 457.

222 (1979) 9 M.P.L.R. 103 at 108.

223 *Id*. at 106.

224 *Id*.

225 *Id*.

226 *Id*.

227 *Id*. at 114.

228 *Id*. at 112.

229 *Id*. at 114.

230 Id. at 112.

231 Id.

232 Id.

233 Id. at 114.

234 [1898] 2 Q.B. 91 at 99-100, cited in 9 M.P.L.R. 103 at 114.

235 (1979) 9 M.P.L.R. 103 at 114.

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237 Leslie A. Stein, "The Municipal Power to Zone in Canada and the United States" (1971) 49 Canadian Bar Review 534 at 544.

238 Id.

239 (1977) 15 O.R. (2d) 425 at 434.

240 (1980) 9 M.P.L.R. 103 at 105, 113.

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242 Id. at 114.

243 Id.

244 Susan G. Hamel, "We are (not) family: Zoning by-laws and Reasonableness - A Comment on Bell," (1980) 1 S.Ct.L.Rev. 369 at 372-73.

245 (1980) 9 M.P.L.R. 117, 10 O.M.B.R. (O.M.B.).

246 (1983) 13 O.M.B.R. 353.

247 (1979) 9 M.P.L.R. 103.

248 (1980) 9 M.P.L.R. 117 at 118.

249 Id.

250 (1983) 13 O.M.B.R. 353 at 354.

251 Id. 373.

252 Makuch, Canadian Municipal and Planning Law (1983) 208 - 9.

253 (1979) 9 M.P.L.R. 103.

254 Makuch, *Canadian Municipal and Planning Law*, *supra* n. 252 at 204.

255 (1980) 107 D.L.R. (3d) 483, 12 M.P.L.R. 141, 27 O.R. (2d) 690 (H.C.)

256 (1979) 9 M.P.L.R. 103.

257 (1980) 27 O.R. (2d) 690 at 693.

258 (1979) 9 M.P.L.R. 103.

259 (1980) 27 O.R. (2d) 690 at 693, 695.

260 (1979) 9 M.P.L.R. 103.

261 (1980) 27 O.R. (2d) 690 at 691.

262 *Id*. at 692.

263 *Id*. at 695.

264 *Id*. at 693.

265 *Id*. at 695.

266 *Id*.

267 *Id*.

268 *Id*.

269 (1981) 29 O.R. (2d) 661.

270 (1983) 21 M.P.L.R. 108.

271 *Id*. at 122-123.

272 (1979) 9 M.P.L.R. 103.

273 The most significant of these decisions are *Southern Burlington County NAACP v Township of Mt. Laurel*, 336 A.2d, 713 (N.J. 1975) and *Southern Burlington Council NAACP v Township of Mt. Laurel*, 456 A.2d 390 (1983 N.J.).

274 (1979) 9 M.P.L.R. 103.

275 *Id*.

276 (1980) 27 O.R. (2d) 690.

277 (1976) 13 O.R. (2d) 626.

278 (1977) 16 O.R. 709.

279 [1979] 6 W.W.R. 335.

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CHAPTER III: RESTRICTIONS ON THE RIGHTS OF PROPERTY OWNERS: DOWNZONING, DEVELOPMENT FREEZES AND ENVIRONMENTAL REGULATION

This chapter examines some of the more common methods by which provincial and municipal planning authorities regulate the exercise of individual property rights for the benefit of the community as a whole. Techniques such as downzoning, holding zones, development freezes, and agricultural/open space zoning help slow the pace of development and preserve areas of the community for future use as low-density residential housing, parkland, and agricultural reserves. However, these techniques also impose substantial economic losses on the landowners whose development rights are severely curtailed. Under present provincial planning and environmental legislation, provincial and municipal planning authorities are rarely obliged to compensate these landowners for the losses they have incurred.

A. Selected Planning Techniques Restricting The Exercise Of Property Rights

1. Downzoning

Downzoning refers to the practice of changing a land use classification permitting one form of development to another classification allowing a different form of development, with an accompanying adverse economic impact to the landowner whose rights have been affected by the change.[1] Downzoning may occur when a municipality, having zoned land prior to devising a comprehensive land use plan, wishes to change the permitted forms of development to ones more compatible with surrounding areas. A municipality may also downzone land if it finds that it has "over-zoned" an area, i.e. its land use plan permits more intensive development than that which has materialized. In order to protect the development that has occurred, a municipality may alter its current zoning by-law to forestall any incompatible growth. Finally, downzoning may be appropriate when a municipality wishes to impose a development moratorium in order to gain time to devise a comprehensive land use strategy for an area.[2] Typically, municipalities use downzoning to accomplish this purpose when they wish to slow the pace of commercial development in residential areas or the rate of urbanization in the urban/rural fringe.

The issues raised by downzoning are common to all land use regulations that limit development opportunities of landowners. Eventually all these regulations, by controlling the adverse effects of private land use decisions, generate development beneficial to the entire community. However, these long-term benefits are produced at the expense of a discrete group of landowners who experience immediate restrictions on their property rights and, generally, an immediate decrease in the value of their land. The disproportionate economic impact of land use regulations, coupled with the benefit flowing to the community, has lead to arguments that landowners should receive compensation for land use regulations that significantly reduce the value of their land.[3] Proponents of a scheme of compensation argue that land use regulations would both be more efficient and more equitable if either the state or the individual community members were forced to recompense landowners for the loss of development opportunities.[4]

The principal efficiency advantage that a compensation scheme affords is the greater likelihood that the gains from any regulatory changes would outweigh the costs such changes impose.[5] If a planning authority were required to pay for losses occasioned by regulatory changes, then it would be more aware of the costs of its proposed actions. Because the authority would be required to either raise the necessary funds through a levy on the community (the beneficiaries of proposed land use regulation) or justify the expenditure from public funds, it would be more conscious of wasteful and unnecessary restrictions.[6] Thus, a planning authority would not enact regulatory changes which were not truly optimal.[7]

The arguments for compensation on equitable grounds centre upon the two problems of horizontal and transitional equity.[8] The former phrase refers to the concern that individuals in roughly the same set of circumstances should be treated similarly. The latter terms refers to the concern that some regulatory actions may "change the rules of the game" in mid-stream, thereby imposing unforeseen economic loss.[9]

Downzoning generally affects a minority of landowners, leaving other individuals with nearby properties free to develop them in a manner denied to the affected minority. As a result of the decreased range of development opportunities in the downzoned area, property values will tend to drop and the potential profit from the sale of land will decline. On the other hand, the value of the unaffected properties will remain the same or even increase, since comparatively less land will now be capable of being developed in accordance with the original land use classification.[10] The uneven, and seemingly arbitrary, effect that downzoning has on property values has frequently lead to the argument that those benefiting from the change in land use classification should compensate the landowner for the restrictions placed on his development rights.[11]

A second form of inequity flowing from downzoning is that created by an individual's reliance on the current status of land use regulation when making investment or development decisions. While it is often possible for individual investors to factor market uncertainties into their private investment decisions, some economists contend that it is more difficult for these individuals to predict changes in land use regulations.[12] Consequently, unforeseen zoning changes can impose economic losses against which individuals have not insured themselves, and leave them with properties that may be difficult to sell.[13] Again, the perceived unfairness of the effects of downzoning provides a reason for arguing that adverse changes in land use regulations should be accompanied by some form of compensation.

In contrast to those individuals who believe that all land use regulations imposing economic loss should be compensable, are those who argue that compensation should only be awarded when a person's property is "taken" by a state planning authority.[14] By this, these commentators mean that a state planning authority should compensate the individual landowner if a land use regulation transfers the beneficial enjoyment of his land, with or without legal title, to the public body for its own use.[15] The physical expropriation of land by a public authority is the most obvious example of a "taking." However, one writer has also suggested that "takings" can occur even though there is no actual transfer of possession and legal title,[16] and has argued that a "taking" occurs whenever one of the incidental rights of property ownership is transferred to a public authority for the purpose of augmenting its proprietary interest in land or buildings in the vicinity of that owned by the individual.[17] In such cases, public regulation places a disproportionate burden on the landowner since he is the only landowner, amongst many similarly situated, who must give up his proprietary rights for the benefit of a public body. Consequently, some form of compensation is necessary to rectify this disparity.[18]

In accordance with their view that only land use regulations "taking" land are compensable, these commentators argue that all other land use regulations do not justify the granting of compensation by the state or the community.[19] This position stems from the fundamental rationale of state land use regulation. As has previously been noted, unregulated private land use decisions generate unforeseen consequences capable of affecting the welfare of many community members.[20] Zoning regulations simply forestall these external costs by limiting private development choices to forms of land use that are compatible with one another. As one writer states, compensation is usually not merited because zoning regulations controlling nuisance-like activities merely force individuals to internalize the costs their decisions create and live up to the standards of land use established by the community.[21] Moreover, the same writer argues, such regulations impose a "reciprocity of burdens" on the community's citizens since everyone is more or less equally affected.[22] Another commentator has suggested that compensation is not necessary for most zoning regulations because the landowner realizes that, in the long run, his immediate loss will be balanced by gains from land use regulations favouring his interests, either as a landowner or as a member of the community.[23]

Two examples illustrate the various considerations that enter into a discussion of whether downzoning imposes an inequitable burden on the individual. Suppose that a given district is zoned as a mixed residential/light commercial district, and commercial development is gradually overtaking residential land use. An individual who acquires land for commercial development can reasonably expect that he will be able to use this property for a commercial purpose. A zoning change which reclassifies land use from commercial/ residential to moderate density residential upsets this expectation, leaving the individual with property he can no longer use in as profitable a manner. Moreover, this individual is affected to a greater extent than other landowners who may have already constructed their shops, which now receive the status of non-conforming uses. In such a situation, there may be some cause for believing that the landowner should be compensated for his unforeseen loss.

Different problems may arise if the residential/commercial mix of the neighbourhood is modified so that residential use outbalances commercial development.[24] In this situation, the individual may be among the first to take advantage of the commercial/residential designation to construct a small commercial establishment. Since increased commercial development will likely create traffic and noise problems, it is possible that a municipal planning authority may downzone the area to impose a moratorium on growth while it reassesses its planning strategy.[25] As the probability of regulatory change is greater in this instance than in the previous one, it can be plausibly argued that the landowner may have assumed this risk and may have insured against downzoning by paying a slightly lower price for the land.[26] Consequently, there is not as strong an argument for compensation.

As can be seen, the downzoning of land is a controversial issue, giving rise to valid arguments both for and against its use. To the municipal council, downzoning is merely an extension of its general regulatory power under provincial planning legislation. It is a useful tool for rectifying specific anomalies in current planning documents, regulating growth at the rural/urban fringe, and controlling the shape of development in other areas of the community where land use patterns are changing. Any restriction on the power to downzone would undoubtedly decrease the flexibility of the planning process and perhaps lead to a less efficient allocation of land.

From the landowner's perspective, downzoning represents one of the more obtrusive ways by which the state regulates the exercise of property rights. Its immediate effect is to restrict the landowner's development options. Further, if the individual has bought land for a specific purpose, and downzoning prohibits him from using the land for that purpose, he generally incurs some economic loss. For large development companies, and other institutional landholders, these losses can be balanced by gains produced by more favourable zoning changes. For the individual landowner, however, the loss is potentially greater because there is less chance that he will profit from land use regulations in other areas of the community. In such situations, the abstract realization that he, as a member of the community, benefits from planned growth may fail to adequately compensate him.

2. Holding Zones and Development Freezes

Current provincial planning legislation enables municipal councils to impose holding zones and development freezes by two methods: first, by openly designating land for future public use pursuant to specific statutory powers; and second, by using their general regulatory powers to make further development uneconomical, thereby freezing land use in its current status.

Relatively few provincial planning acts actually provide a formal mechanism whereby municipal councils can place land under a holding designation while they determine what form of development is most appropriate. The Ontario Planning Act, S.O. 1983, c.1 gives local planning bodies the authority to place land under a holding classification as long as the following criteria are met: the official plan must allow for the use of holding zones; they must only be used to slow the rate of development in a given area; and the municipality must review the holding classification every five years.[27] Other legislation, such as the Planning Act, R.S.A. 1980, c.P-9 and the Planning Act, S.N.S. 1983, P-15, grant municipal governments the authority to place land under a temporary open space land use classification while they decide whether this land should be used for public parkland or recreational facilities. The Planning Act, R.S.A. 1980, c.P-9,states that the municipality must acquire land, or commence acquisition proceedings, within six months of dedicating it for public use. Failing that, the municipality must amend the land use by-law to permit development again.[28] The Nova Scotia Planning Act allows municipalities in that province to designate land for future use as public park or recreational areas, but also requires the municipality to purchase that land within a five-year period and make annual payments to the landowner during the interim.[29]

Restrictions such as these are intended to protect the rights of individual landowners by ensuring that a public planning authority can freeze their land for a limited period, after which the authority must either compensate the landowner or lift the holding classification. This type of planning legislation tries to strike a balance between the sometimes competing interests of municipal planning authorities and individual landowners.

However, the provincial planning legislation of Alberta, Nova Scotia and Ontario, as well as that of the other provinces, enables municipal governments and other planning bodies to use their general regulatory powers to enact land use by-laws which effectively freeze further development by making such development uneconomical for the landowner. In general, there is no statutory obligation to provide the landowner with compensation;

indeed, some provincial statutes expressly negate the individual's claim for compensation arising from the imposition of zoning by-laws.[30]

One of the more controversial techniques presently in use is agricultural/open space zoning. Generally, if land is zoned under this classification only agricultural pursuits are permitted as-of-right, while compatible forms of development are listed as discretionary uses. This form of zoning can be used to achieve a variety of purposes, according to the state of development at the urban/rural fringe. Depending upon the purpose underlying the implementation of agricultural zoning, questions of compensation can be raised.

On one level, agricultural zoning represents a means of regulating growth in a rural community, thereby controlling the effects of urban development on the region's economy.[31] For example, land use regulations prohibiting individuals from dividing land into units of less than 80 acres help prevent the spread of hobby farms among larger, operational farms and serve to slow the rate of urbanization.[32] Similarly, the practice of directing subdivisions into areas of marginal agricultural capability helps maintain the physical integrity of large parcels of farmland and mitigates some of the harmful, nuisance-like effects stemming from residential development.[33] As a result, high capability agricultural land is preserved.

Few compensation problems arise from this type of agricultural zoning. In fact, agricultural zoning of this type actually benefits the owner of a farming operation because it stems encroaching urban development and helps maintain his land as a viable economic unit. Even though the landowner may lose his opportunity to sell his property for an amount reflecting its development potential, this loss is not one that creates a reliance-based claim for compensation. Presumably, the landowner originally acquired the property for its agricultural value and not for its development potential. Therefore, the imposition of agricultural zoning does not upset any expectations based upon favourable zoning. In addition, there are no significant problems of compensation arising from the disparate treatment of landowners in the region. All landowners are more or less equally burdened by the restrictions in the land use by-law, and all benefit from its long-term effects.

When a municipality imposes agricultural zoning in a developing area however, the effects are less equitable. Arguably, many individuals will have brought agricultural property with the expectation of either selling it or developing it for residential or small-scale commercial use. The imposition of agricultural zoning for the purpose of creating a holding zone or development freeze upsets the seemingly reasonable expectations of individual and corporate investors, and creates monetary losses arising from foregone interest and the costs of holding land through the moratorium period.[34] While corporate investors can frequently absorb such losses, many smaller companies and individuals are not as well-situated since they may have acquired their property as a one-time investment.[35]

A municipality can also use agricultural/open space zoning to preserve land in a comparatively undeveloped state for its aesthetic value and for its worth as a natural area. This particular use of agricultural zoning is exemplified by the recent actions of the City of Calgary.[36] In 1980, the City of Calgary put land in the vicinity of a proposed park under an agricultural/open space land use classification. Under this classification only agricultural operations, single family homes on 20-acre lots, public buildings, and recreational developments were permitted forms of land use.[37] Given the development company's reasons for acquiring this land, the agricultural/open space designation made further development uneconomic. As a result, the land adjacent to the public park has remained essentially undeveloped for a six-year period while the City of Calgary determines whether it will purchase this land. In the interim, the residents of the City have been able to enjoy the amenities provided by the undeveloped property.

This particular application of agricultural zoning is the most controversial since the landowner, whether an individual or a corporation, has been singled out by the municipality for differential treatment. Relatively few landowners are required to absorb the loss imposed by agricultural zoning, while the surrounding landowners and general community reap the benefits of a natural area or park. For corporate landowners, the immediate loss may eventually be balanced by gains resulting from favourable zoning. However, for the private landowner, the probability of future gains outweighing immediate losses is slight. In such cases, the sole advantage accruing to the private landowner is the benefit he, as a member of the community, experiences from having a greater percentage of land dedicated to public use.

3. Environmental Regulation

Many provincial governments have enacted legislation pursuant to which the relevant provincial Minister may designate land as a "special area", for example, an agricultural reserve,[38] an historic resource area,[39] wildlife habitat,[40] a restricted development area,[41] or an ecological reserve.[42] In some cases, once an individual's land has been designated as a "special area", it can only be used for the purposes outlined in the applicable statute. In other cases, it can only be used for such purposes as the Minister prescribes by regulation.

Both the Agricultural Land Commission Act, R.S.B.C. 1979, c.9 and the Agricultural Land Preservation Act, S.Q. 1978, c.10 typify the first form of provincial legislation. Both specify that land falling within the area designated as an agricultural reserve must be used solely for agricultural purposes unless the owner receives approval to use the land for other purposes.[43]

The Department of the Environment Act, R.S.A. 1980, c.D-19 is an example of the second form of legislation. Pursuant to Section 2(a) of the Act, the Minister of the Environment may designate parts of the Province of Alberta as restricted developments areas (RDA's) and prescribe regulations controlling, restricting, or prohibiting land use and development within the designated area.[44] The Edmonton Restricted Development Area Regulation imposes a a general prohibition against individuals continuing or commencing any operation or activity that disturbs or is likely to disturb the surface without the prior approval of the Minister.[45] The Regulation further prohibits various specific types of land use (including the preparation of land for residential, commercial, industrial or recreational development) without first obtaining the permission of the Minister.[46]

Provincial legislation permitting the creation of "special areas" is an extension of the more localized municipal and regional land use by-laws. Essentially, this legislation attempts to accomplish the same purposes underlying local land use by-laws, namely to control and regulate the adverse external effects of private land development so that it is as beneficial as possible for adjacent landowners and the surrounding community. Provincial legislation differs from localized zoning, however, in its scope and its objectives, which are generally more long-term.

An example of the scope and type of objectives which underlie provincial legislation is provided by the Agricultural Land Commission Act, R.S.B.C. 1979, c.9. This legislation gives a provincial planning body, the Agricultural Land Commission, the power to designate areas of British Columbia as agricultural reserve on the basis of province-wide soil capability studies and after consultation with the relevant municipal government.[47] Mandatory province-wide agricultural zoning was seen to be necessary in view of the increasing urbanization of prime agricultural land and the proven inability of local land use controls to reverse this trend.[48] By enacting strict controls over the use and development of the Province's remaining productive land, the British Columbia Legislature has attempted to ensure that the needs of present and future consumers can be at least partially met by the Province's agricultural producers. From the farmers' perspective, this legislation has helped to maintain the economic viability of the agricultural sector and has halted the acquisition of productive land for speculative purposes.[49]

There are few quantitative studies concerning the effect of legislation such as the Agricultural Land Commission Act on property values. One English study of property values under green-belt legislation suggests that land formerly used for residential purposes could decrease as much as £38,600 in value when placed in a green belt area.[50] A recent study of the effects of the Quebec agricultural legislation analysed land prices for the period 1975-1981, concluding that land prices for lots within agricultural zones were significantly less than those for lots in less restrictive zones.[51] A third study on the Agricultural Land Commission Act showed that agricultural land was no longer being acquired for speculative purposes, implying that land prices had fallen.[52]

Provincial legislation differs in the degree to which it affords compensation to landowners affected by a "special area" designation. Some legislation, such as the Historical Resources Act, R.S.A. 1980, c.H-8, provides that a municipality must compensate a landowner when it designates an area or building as an historic resource.[53] Other legislation, such as the Cultural Property Act, R.S.Q. 1979 c.B-4, and the regulations enacted thereunder, provides tax exemptions for land or other property designated as "cultural property".[54] Still other legislation, such as the Department of the Environment Act, R.S.A. 1980, c.D.-19, grants the Minister a discretionary power to determine whether an individual should be given compensation.[55] Finally, many pieces of legislation do not provide the landowner with any claim to compensation, and, in fact, expressly negate such a right.[56]

It is this latter legislation, as well as that making compensation discretionary on the Minister's approval, which raises similar problems to those discussed in connection with downzoning and development freezes. Essentially, the landowner is required to give up his development rights and absorb a substantial economic loss so that other members of the community benefit from his land remaining in its present state. The landowner, however, receives no immediate monetary compensation to cover the significant drop in property values. The only benefit he receives is the knowledge that his land has been preserved as a valuable agricultural, historic, or ecological reserve. In certain circumstances this protection may indeed be of value to him. In other cases, it may seem a rather abstract benefit.

B. Judicial Response To Downzoning, Holding Zones And Development Freezes, And Environmental Regulations

The reaction of the Canadian judiciary to downzoning, holding zones, and provincial land use regulations has been divided. The Supreme Court of Canada in the decisions of Township of Scarborough v. Bondi[57], Soo Mill and Lumber Co. Ltd. v. Sault Ste. Marie,[58] and Calgary City Council v. Hartel Holdings Ltd.[59] appears to have adopted a position favourable to municipal and provincial planning authorities, and has upheld the validity of land use regulations downzoning land and creating development freezes despite the economic loss such regulations cause. The Provincial courts have also upheld the use of downzoning and holding zones, particularly if evidence shows that the municipality has used these techniques to control the adverse effects of urban growth.[60] However, the Provincial courts have been less willing to sanction these measures if it appears that the municipality has attempted to evade its responsibility to purchase or expropriate land by using its general regulatory powers.[61] In such circumstances the courts have struck down the applicable land use regulation, stating that the municipality has acted in a discriminatory manner and in bad faith.

1. Downzoning

Since the Supreme Court of Canada decision in Township of Scarborough v. Bondi[62], and the earlier decision of the Saskatchewan Court of Queen's Bench in Regina Auto Court v. Regina (City)[63], Canadian courts have recognized downzoning as a valid planning technique, even though its use may cause substantial economic loss. Since these decisions, Canadian courts have accepted the loss created by land use planning as an inherent and inevitable effect of state land use regulation -- a price that all landowners must pay in exchange for receiving the benefits of planned urban growth. It is only when downzoning prohibits all development, or circumstantial evidence suggests that a municipality has used it to evade purchasing or expropriating land, that Canadian courts question this planning technique.

In Regina Auto Court v. Regina (City)[64], the City of Regina amended its zoning by-law so as to change the zoning of the plaintiff's land from residential to park.[65] The plaintiff sued the City for damages, alleging that the City had caused it to lose the "equitable ownership" of its property or, alternatively, had made its land impossible to sell.[66]

The Saskatchewan Court of Queen's Bench dismissed both of the plaintiff's arguments, and upheld the City's right to amend the zoning by-law.[67] In response to the plaintiff's claim that it had suffered damages as a result of the loss of "equitable ownership" of its property, the Court stated:[68]

> It is true that any zoning by-law restricts the full and complete user of any property affected thereby. The right to continue to use the property and any buildings thereon for purposes for which it was being used prior to the passing of the by-law is provided for in the by-law... The plaintiff is still the registered owner of the property and of course can dispose of it but the property would remain subject to the provisions of the zoning by-law.
>
> The fact that it is to some extent confiscatory in nature does not in my opinion affect the validity of the by-law or the right of the city to enact

> such by-law. As Meredith, J.A. says in Re Dinnick and McCallum (1913) 28 OLR 52: 'The legislation is confiscatory in its character although, of course, it is intended to be put in force for the general benefit - including the benefit of each owner generally only.'

In the Court's opinion, zoning was necessary to properly plan the future development of the City.[69]

In Township of Scarborough v. Bondi,[70] the Supreme Court of Canada upheld the validity of "spot zoning", whereby a municipality passes a land use regulation pertaining solely to one property.

The Township of Scarborough had originally enacted a zoning by-law permitting the construction of only one dwelling per 100 feet of frontage on a public street. Mr. Bondi's property lay in a lot whose size would have allowed the construction of four dwellings, two on the east half and two on the west.[71] The east half of the lot had one house built on it, whereas Mr. Bondi's half was vacant. Mr. Bondi had purchased the property from the original owner on the condition that it was possible to obtain permission from council to construct two houses on his portion, both of which would be considerably smaller than the other houses in the area.[72]

Adjacent owners petitioned the Township to amend the by-law because Mr. Bondi's development would have been incompatible with the rest of the neighbourhood.[73] The council passed an amendment permitting the construction of only two houses on one lot.[74] Mr. Bondi launched a court action, alleging that the amending by-law had been made in bad faith and was discriminatory.[75] After losing before the Supreme Court of Ontario, Mr. Bondi appealed the decision to the Court of Appeal, which overturned the lower court's ruling.[76] The Township then appealed that decision to the Supreme Court of Canada.[77]

The Supreme Court of Canada upheld the amending by-law, stating that the Township had acted in good faith to promote the interests of the community.[78] The Court specifically rejected Mr. Bondi's argument that the amending by-law was discriminatory because his property was the only one affected by the council's actions. Instead, the Court found that the amending by-law merely represented an attempt to correct an anomaly in the original zoning by-law.[79] At the time when the original by-law was enacted, the Township could not have foreseen that the lot could have been subdivided in a manner permitting the construction of more than one house. Had the Township been able to foresee this possibility, it would have zoned the area so as to prevent developments such as that proposed by Mr. Bondi.[80] According to the Supreme Court, the purpose of the by-law was[81]

> to compel the respondent to fall in with the general standards of the neighbourhood and prevent him from taking advantage of the district's amenities, the creation of the by-law, to the detriment of other owners. Far from being discriminatory, the amending by-law is nothing more than an attempt to enforce conformity with the standards established by the original by-law and which have been observed by all the owners in the subdivision with this one exception.

In this instance, the Township had amended its land use by-law to forestall development which threatened to create some external costs for the surrounding property owners. Mr. Bondi did suffer some loss since he could no longer build two houses. He was left, however, with property which could be developed for residential use. In addition, as the Supreme Court noted, his property continued to benefit from its location in a spacious residential area whose amenities were protected by the same by-law he was challenging.

In a more recent decision, Monarch Holdings Ltd. v. Corporation of the District of Oak Bay,[82] the British Columbia Court of Appeal upheld a zoning by-law depriving a development company of its opportunity to build a small condominium.

In 1960, Monarch Holdings Ltd. ("Monarch") purchased property for development as an apartment building. The applicable by-law at the time of purchase permitted the construction of a three-storey building with a minimum space of 3500 square feet.[83] During the latter part of May, 1973, the Council considered introducing a by-law changing the zoning to single family residential.[84] After representations by various owners, the Council amended the proposed by-law to make all existing apartments non-conforming uses. However, the properties belonging to Monarch did not receive that classification as construction had not yet commenced.[85] In December, 1973, the Council enacted further amendments effectively reducing the allowable minimum floor area.[86] In 1976, Monarch applied for a development permit to construct a twelve-unit condominium which substantially complied with the requirements of the amended by-law, which was refused.[87] In May, 1976, the Council enacted a further by-law setting the maximum density for condominium units at a level which restricted the number of units Monarch could build.[88] Theoretically, this by-law affected land development in a large area of the community. However, as Monarch's properties were the only developable sites in the rezoned area, the by-law had an immediate and unequal impact on the value its land.

Monarch sought to compel the Council to issue the development permit. It then moved to quash the by-law, arguing that the Council had acted in bad faith.[89] The British Columbia Provincial Court dismissed Monarch's application.[90]

The British Columbia Court of Appeal, in the first section of its judgment, also dismissed the mandamus application because the amending by-law had been in effect when the application was heard. Therefore, the Court stated, it could not order the authorizing officer to do something directly contrary to a by-law regularly passed and adopted.[91]

In the second part of its judgment, the British Columbia Court of Appeal upheld the validity of the by-law, comparing it to the by-law upheld by the Supreme Court of Canada in Township of Scarborough v. Bondi.[92] In the Court's opinion, the by-law was of general application, affecting numerous property owners.[93] It created a set of uniform standards, subject to the rights of individuals whose property had been granted the status of a non-conforming use.[94] The Court acknowledged that Monarch's development proposal had spurred the Council to pass the amending by-law, but it stated that the Council's actions were consistent with its policy of restricting apartment development and were not discriminatory.[95] Summarizing its position, the Court stated:[96]

> The mere fact that the economic interest of the appellant was adversely affected by the rezoning, and that its right to use its property was limited, and that the value of its property was adversely affected, will not justify a finding of bad faith on the part of the municipality for it is

> inevitable that in the exercise of its zoning powers a municipality will affect adversely from time to time the property of landowners.

These three decisions illustrate the predominant judicial view of state land use regulation, in general, and downzoning, in particular. Canadian courts have traditionally accepted the premise that restrictions on individual property rights are necessary for the rational development and use of the community's land resources. This position is best illustrated by the Supreme Court of Canada's judgment in Township of Scarborough v. Bondi, where the Court implied that Mr. Bondi must suffer some limitations on his property rights as a quid pro quo for the advantages that he, as a member of the community, received from planned urban growth.[97]

Further, these decisions clearly indicate that land use regulations are not invalid simply because they affect one or two individuals disproportionately. In each case, the landowner was the only one to suffer from the restrictions imposed by the municipality. However, neither the Supreme Court of Canada in Township of Scarborough v. Bondi,[98] nor the British Columbia Court of Appeal in Monarch Holdings Ltd v. Corporation of the District of Oak Bay,[99] considered this as evidence of discrimination. To the Supreme Court, the by-law, rather than being discriminatory, forced Mr Bondi to conform with the general land use pattern in the area.[100] In the opinion of the British Columbia Court of Appeal, the by-law in Monarch Holdings Ltd v. Corporation of the District of Oak Bay was of general application and consistent with the Council's planning policy.[101] Monarch Holdings was affected to a greater degree than other landowners through a combination of its own development plans and the timing of the Council's by-law. Like the Supreme Court, the Court of Appeal saw the by-law as a means of establishing and enforcing community standards.[102]

Finally, the decisions show that substantial economic loss is not a sufficient cause for invalidating a land use by-law. To Canadian courts, a decrease in property value is an inevitable effect of planning, and one that must be accepted by the individual landowner.

Two further points can also be made about the zoning by-laws in Township of Scarborough v. Bondi,[103] and Monarch Holdings Ltd v. Corporation of the District of Oak Bay.[104] First, the zoning by-laws were designed to combat development that the community perceived as being incompatible with the surrounding area. The restrictions imposed by the by-laws produced benefits for the neighbourhood, but they did so only because they stopped the offending development in its proposed form. In both cases, there was no suggestion that the municipal councils sought to prohibit development for the sole purpose of preserving land for future public use. Second, both zoning by-laws merely curtailed the extent of development. They did not completely prohibit the landowners from using their properties for their original purposes. In situations where Canadian courts have declared downzoning invalid one or both of these factors has been missing.

In Re Corporation of District of North Vancouver Zoning By-law 4277, the British Columbia Supreme Court quashed a by-law rezoning residential land to a parkland.[105] The appellant entered into an interim agreement to purchase certain land subject to obtaining subdivision approval within forty days of acceptance of the offer.[106] After discussions with various planners and engineers, the appellant was lead to believe that development approval would be granted. Relying on these assurances, the appellant purchased the property.[107] Subsequent discussions with the planning department revealed that the department had decided that the appellant's land was to serve as parkland for the community.[108]

The planning department and the appellant entered into a series of negotiations respecting the exchange of land; these negotiations proved fruitless. The planning department refused three successive applications for subdivision approval and finally made formal application to Council for rezoning.[109] The municipal planner submitted a report to Council in which he stated that the department felt that the appellant's land should be preserved as a natural area.[110] The report also indicated that the planning department staff had adopted a policy of limiting residential development until the municipality was able to acquire the land.[111]

After a public hearing during which the planning report was read and tabled, the Council enacted a zoning by-law classifying the appellant's land as park and open space.[112] The appellant sought to quash the by-law, alleging that the Council had attempted to depress the market value of the land prior to acquiring it.[113]

The British Columbia Supreme Court quashed the by-law, stating that events prior to the enactment of the by-law demonstrated that the Council had intended to depress property values.[114] In the Court's opinion, the members of the planning department had unilaterally decided that the appellant's land should be preserved as a natural area. Further, they had also determined that the most economical way of acquiring this property was to depress its price.[115] Since the Council had full knowledge of the planning department's strategy, the Court determined that it was as culpable as the planning department.[116] The Court held that the Council's attempts to evade its obligations to purchase the appellant's land constituted bad faith.[117]

In Columbia Estate Company Limited v. Corporation of the District of Burnaby,[118] the British Columbia Supreme Court faced a similar situation. Columbia Estate Company Limited ("Columbia"), a wholly owned subsidiary of British Columbia Hydro ("B.C. Hydro"), owned land subject to an industrial/manufacturing land use classification.[119] From December, 1970 to April, 1974 company officers held discussions with municipal officials, during which both Columbia and B.C. Hydro advised the municipality that they wished to develop certain lots as warehouses. Until the end of these discussions, the municipality had never given either company any indication that these plans were unacceptable.[120]

However, while negotiations were continuing, the Council had requested the Minister of Municipal Affairs to place the land under government ownership until a study could be made to determine the land's suitability for a park and ride facility.[121] In January, 1974, unbeknown to Columbia, the planning department had recommended that the Council take steps to protect the large, black-topped area from further development.[122] As an appropriate course of action, the planning department suggested that Columbia's land be rezoned.[123] After a public hearing, the council rezoned the land as a parking district.[124]

The British Columbia Supreme Court declared the by-law ultra vires,[125] finding that the Council had enacted the by-law to accomplish a "public purpose", namely to provide a parking facility for residents commuting to central Vancouver.[126] The Court reviewed those sections of the Municipal Act, R.S.B.C. c.1960, c.255 which enabled the municipal council to acquire and reserve land for public purposes. In the Court's view, these sections established the only means by which a municipality could freeze land in order to retain it for public use.[127] Although the Municipal Act gave the City of Burnaby the general authority to enact zoning by-laws, it had not expressly given the City the power to reserve private land by this device.[128] Applying the principle that ambiguous legislation should be construed in favour of the individual whose rights it affects, the Court found that the Council had acted beyond its jurisdiction when it downzoned Columbia's property.[129]

These latter two decisions are easily distinguishable from Township of Scarborough v. Bondi,[130] and Monarch Holdings Ltd v. The Corporation of the District of Oak

Bay.[131] Whereas the municipal councils in those cases merely sought to control the extent and form of development, the municipal councils in the North Vancouver and Burnaby cases prohibited virtually all further use of the properties. As well, circumstantial evidence indicated that the municipal councils acted to preserve private land so that it could be used for the benefit of the entire community, but, in so doing, had tried to lower its market value or evade acquiring it completely. In both cases, it seemed as if the landowners were being forced to dedicate their land for the community's use without receiving any form of compensation in exchange.

In a third decision, Re Rodenbush and District of North Cowichan,[132] the British Columbia Supreme Court again dealt with a situation in which an individual landowner was faced with a zoning by-law curbing his right to develop his property as he had intended. Rodenbush was a lessee of Doman Industries Ltd. ("Doman"), a major logging firm on Vancouver Island. In 1974, Doman acquired a defunct saw mill operation in the Cowichan Estuary.[133] At approximately the same time, the Environment and Land Use Committee, a provincial body, initiated a study of the estuary area in which it recommended that the status quo be maintained and that further industrial expansion be halted.[134] The Committee, in its report, indicated that Doman's operations formed part of the status quo.[135] In 1975, the Council of the District of North Cowichan adopted this report and consented to the continued operation of the existing mill.[136] At no time during this period did Doman make the Council aware of the fact that Rodenbush was its lessee and that he intended to develop the leased property.[137]

In August, 1976, Rodenbush approached the Council with respect to developing the leased land as a shake and shingle mill.[138] During the ensuing negotiations, the Council's administrator lead Rodenbush to believe that his plans were acceptable, pending approval by the relevant provincial environmental agencies.[139] The Environmental and Land Use Committee gave its approval in October, 1976.[140]

Between November, 1976 and February, 1977, the Council discussed and finally passed a zoning amendment which reclassified Rodenbush's land from "rural" to "rural residential".[141] The latter classification, which applied only to Rodenbush's land, prohibited the construction of a sawmill.[142] Doman's own sawmill operation was not affected.[143]

Rodenbush and Doman then sought an order quashing the by-law, alleging that it was discriminatory, prohibited all reasonable use of Rodenbush's property, and was made in bad faith.[144]

The British Columbia Supreme Court quashed the by-law, stating that the Council had acted in bad faith and in a discriminatory manner.[145] In arriving at this conclusion, the Court cited various factors which demonstrated the impropriety of the Council's actions. First, the Council had lulled Rodenbush into believing that it would grant his building permit. When the Council learned the Environment and Land Use Committee was prepared to allow further development in the estuary, it acted quickly to stop Rodenbush from constructing his mill.[146] Second, the by-law covered only Rodenbush's leased thirteen acres, leaving Doman to develop the other portion of the land.[147] Third, the Council's actions had deprived Rodenbush of any opportunity to use his property for the purpose he had intended. According to the Court,[148]

> It is not bad faith merely to cause economic loss to a private owner if the action is carried out in the interests of all the community. But here the action amounts to confiscation since the applicants claim the land has no other proper use and this claim has not been challenged.

Again, the Court reiterated that if the Council wished to reserve land for a public purpose it must acquire that land through sale or expropriation.[149]

This case is again distinguishable from Township of Scarborough v. Bondi[150] and Monarch Holdings Ltd v. Corporation of the District of Oak Bay[151] on the basis that the by-law in question effectively prohibited any further use of Rodenbush's land and did not merely control development. In addition, the Council prohibited all further development for the sole purpose of preserving Rodenbush's land in its natural state. Consequently, Rodenbush was being asked to forego taking advantage of his right to develop his land in order that the wider community could benefit from its natural attributes. Unlike the plaintiffs in Township of Scarborough v. Bondi,[152] Rodenbush was not left with land which was still valuable to him.

One of the most recent decisions to discuss the validity of downzoning is Hauff v. City of Vancouver.[153] The plaintiff owned land situated in the Stanley Park area, forming part of the City's scenic drive. The City Council had adopted a policy stating that it wished to maintain the property values in the Stanley Park area at their current level.[154] It was the City's intention to eventually purchase all private property in the area, although, in view of escalating land prices, complete acquisition would not occur until well into the future.[155] In order to maintain property values, the City reduced the size of improvements permitted on the seaside lots by restricting development to within 120 feet of the road.[156] This restriction effectively reduced the potential developable space of some lots by an estimated sixty percent.[157]

The plaintiff sought to quash the zoning by-law, alleging that its purpose was to limit the future value of his land and thus facilitate its later acquisition as parkland.[158]

The British Columbia Supreme Court agreed with the plaintiff's arguments, and held the by-law to be ultra vires the City of Vancouver.[159] The Court found that the primary purpose of the zoning by-law was to restrain property values with the view to reducing the future cost of acquisition.[160] Further, the Court found that the zoning by-law had a significant effect on the future value of the affected lots, although it did not cause an immediate reduction in current market value.[161] In the Court's opinion, the long-term effect of the by-law and its underlying purpose were similar to the by-law discussed in the North Vancouver case. Both by-laws deprived the individual landowner of his right of enjoyment of property and were essentially confiscatory.[162] In conclusion, the Court found that the by-law had not been passed bona fide for the purposes for which the City's zoning power had been granted, but for an improper and unauthorized purpose.[163]

The British Columbia Court of Appeal upheld the lower court's judgment.[164] It affirmed its findings of fact, and agreed with its conclusion that the by-law created "a present loss of subjective value" for the owners since it restricted the further development of their properties.[165] Finally, the Court of Appeal also found that the decrease in property values was intimately connected with the City's plan to eventually acquire the Stanley Park properties for parkland.[166] For these reasons, the Court of Appeal held the by-law to be _ultra vires_ the City of Vancouver.[167]

This decision is noteworthy for the sympathetic approach of the British Columbia courts towards the landowner's position. Both the Supreme Court and the Court of Appeal were prepared to find that the value of the plaintiff's land had decreased, even though housing prices had actually risen after the City had passed the by-law.[168] The Courts, in arriving at this conclusion, viewed the effect of the by-law from the landowner's perspective. Despite having no immediate impact, the by-law would ultimately cause the plaintiff's property to be less valuable since he could no longer make improvements to it that would increase its future sale price. As a result of the by-law, the plaintiff would now see property values rise at a comparatively slow rate, whereas he may have expected to realize a far more substantial profit on the sale of his property prior to the enactment of the by-law.

The Courts were also able to link this likely drop in property values to the City's acquisition plans, thereby bringing the plaintiff's case within the reasoning of the earlier decisions of Re Corporation of District of North Vancouver Zoning By-Law 4277,[169] and Columbia Estate Company Limited v. Burnaby.[170] In so doing, the Courts departed slightly from these earlier decisions. There, evidence established that the municipal councils had definite and immediate plans to acquire the property in question. In Hauff v. City of Vancouver,[171] however, the City had merely developed a policy with respect to the acquisition of private land. Although the City hoped to be able to eventually implement its policy, present land prices made the acquisition of land in the Stanley Park area virtually impossible. In a sense, therefore, the by-law in this case was more onerous than those in the earlier cases since the plaintiff had no assurance that the City would eventually acquire his land. Rather, the plaintiff was required to absorb a substantial drop in the value of his property for an indefinite period while the City decided whether it could afford to implement its park policy By extending the reasoning of the earlier decisions, the Courts were able to check a seemingly abusive use of the City's regulatory powers.

As the cases on downzoning indicate, the Canadian judiciary, while acknowledging the importance of state regulation of land use, continues to respect the sanctity of property rights. Although the Courts countenance substantial restrictions on the landowner's right to the use and enjoyment of his property, they will invalidate those land use by-laws which have no basis in the enabling legislation, are discriminatory, or evidence bad faith. The British Columbia courts have consistently held that a municipality cannot use its general regulatory powers to evade its responsibility under the Municipal Act to acquire private land for public use. Such a use of the municipality's zoning powers constitutes bad faith and discriminates against the landowner.

Underlying this position, is the view that downzoning is inequitable if it deprives a landowner of all opportunity to develop his property and preserves that property for public use. In Re Rodenbush and North Cowichan, the British Columbia Supreme Court stated that a land use by-law "confiscated" the plaintiff's property when it made all possible development uneconomic.[172] The British Columbia Supreme Court in Re Corporation of District of North Vancouver Zoning By-Law 4277 came to a similar conclusion about a land use by-law that froze private land until such time as it was acquired by the municipality.[173] In Hauff v. City of Vancouver, the British Columbia Supreme Court, in a lengthy passage, spoke of the difference between land use by-laws which validly regulated property rights and those which were confiscatory:[174]

> The right to enjoyment of property and to be deprived thereof only by "due process of law" being a fundamental liberty of the subject, long recognized by the law and affirmed by parliament in the first section of the Canadian Bill of Rights, it is impossible that a Court would construe such general words as those contained in s.565 of the Vancouver Charter as conferring the right to influence land values with a view to advancing the interests of a public body in acquiring private property. Such a procedure strikes at an important incident of Canadian citizenship.
>
> It is, of course, true that a zoning by-law may adversely affect property values without being open to objection...but this is true only of a by-law passed for a bona fide planning purpose, that is to say for purpose having to do with use or occupation of land in private ownership. Such incidental result of any regulation made by a municipal authority is but one of the innumerable influences which cause changes in the property values in the market place. Happenstance creates value and may as readily take it away, and the property owner must accept the consequence of zoning by-laws. Employment of governmental powers deliberately to limit the value of property with a view to its transfer to the state for a lower price, is something quite different. The difference, among free men, is not a subtle one; it is fundamental.

The British Columbia courts, by insisting that municipalities acquire or expropriate private land, have tried to ensure that the landowner receives some compensation for the loss of his right to use and enjoy his property.

2. Holding Zones and Development Freezes

The judicial response to holding zones and development freezes has been divided. The Supreme Court of Canada has sanctioned this device in the cases of Soo Mill and Lumber Company Ltd. v. Sault Ste. Marie[175] and Calgary City Council v. Hartel Holdings Ltd.[176] The lower courts, however, have been less ready to accept it, especially if they have reason to believe that a municipality has imposed a holding zone in order to evade purchasing or expropriating property. In this respect, the judicial response to holding zones is similar to that towards downzoning. Canadian courts accept the role that holding zones play in regulating land use and development and recognize that individual property rights must be circumscribed in order to attain a land use allocation ultimately beneficial to all parties concerned. At the same time, the courts respect the importance of property rights and acknowledge that planning authorities occasionally exercise their regulatory powers in a manner which unjustifiably discriminates amongst landowners or places particularly onerous conditions on one individual.

One of the leading cases on the subject of holding zones is Soo Mill Lumber Company Ltd. v. Sault Ste. Marie,[177] which concerned the use of a holding zone to retard the pace of urban development. Soo Mill's land had been zoned as RM10, a land use classification in which apartments and other multiple dwellings were permitted uses.[178] The City of Sault Ste. Marie enacted a zoning by-law permitting it to place certain lands under a holding classification.[179] According to the by-law, holding zones were to be used to delay the development of certain lands "until they appear ready for development and until the standards appropriate to the designated use can be satisfied."[180] The City of Sault Ste. Marie placed Soo Mill's land under a holding zone because it was not ready for development.[181] As a consequence, Soo Mill was restricted to using its land for agricultural pursuits, farmhouses, and other accessory buildings.[182] Because the land was located in the centre of residential and commercial development, the permitted uses were uneconomical.

Soo Mill challenged the validity of the by-law before the Ontario Provincial Court, which held the by-law to be ultra vires.[183] On appeal, the Ontario Court of Appeal reversed the lower court judgment.[184] Soo Mill then appealed to the Supreme Court of Canada.

Chief Justice Laskin, speaking for the Supreme Court, affirmed the Court of Appeal decision and upheld the validity of the by-law,[185] and, in so doing, clearly indicated that land use regulations were to be given a sympathetic treatment by the judiciary. According to his Lordship, the City could validly impose a holding zone because it was "a method of maintaining orderly growth through the retention of powers to tighten or relax, as social and economic circumstances indicate, the overall programme of development in the Official Plan."[186] Although the holding zone sterilized commercial and industrial development of Soo Mill's land it was not confiscatory because it permitted alternative agricultural uses.[187] It was not discriminatory because the City had imposed it in the context of an overall plan of development.[188] Nor was the holding zone invalid because it was imposed indefinitely, and could only be removed after an application by Soo Mill.[189]

The decision of Soo Mill and Lumber Company Ltd. v. Sault Ste Marie[190] obviously grants municipal planning authorities a great deal of discretion when planning the long-term growth of their community. It provides few guidelines as to the circumstances which would warrant the use of the holding zone techniques or those where its use would be inappropriate. According to this decision, a municipal planning authority could impose a development freeze indefinitely, only lifting this freeze when it determined that the area was ready for more intensive development. While flexibility is a desirable attribute of the planning process, judicial decisions such as Soo Mill and Lumber Company Ltd. v. Sault Ste. Marie[191] provide municipal planning authorities with opportunities to abuse their regulatory powers.

The more recent Supreme Court decision of Calgary City Council v. Hartel Holdings Ltd.[192] expands upon many of the points raised in that Court's earlier decision and examines the issue of whether a municipal planning authority can validly impose a development freeze for an indefinite period of time.

Hartel Holdings Ltd. ("Hartel") acquired land in the north of Calgary for the purpose of intensive residential development. When Hartel acquired its land, the zoning classification was "A-Agricultural". Permitted uses were parks, farms, schools, public buildings, public and private recreational facilities, and private dwellings on a minimum site of twenty acres.[193]

At the same time, the City of Calgary had begun to formulate plans to develop a major park in the north Calgary area; Hartel's land was included in the proposed park.[194] During the period 1972-1980, the City of Calgary enacted a number of resolutions and devised various statutory plans showing a proposed Nose Hill Park situated where Hartel's land was located.[195] By June, 1980, the park proposal was incorporated into the City's general municipal plan.[196]

In May, 1980, the City enacted a new land use by-law, pursuant to which Hartel's land was zoned "A-Agricultural and Open Space."[197] This classification again permitted only essential public services, agricultural operations, parks, utilities, and single detached homes on twenty-acre lots on Hartel's land.[198] The provisions of the land use by-law froze any further development of the land, since Hartel had intended to use its property to create a residential subdivision.[199]

During this period, the City of Calgary and Hartel had held discussions with respect to the City's purchase of Hartel's property. In 1972, the City had made an offer to Hartel, which the company rejected.[200] In 1979, the City made a second offer. This offer was lower than the earlier one, and was substantially less than what the City had offered to an adjacent land owner.[201] Hartel rejected the offer, arguing that the City should be required to purchase the land pursuant to s.70 of the Planning Act, S.A. 1977, c.89 (now R.S.A. 1980, s.72)[202] which states:

> 70(1) If land is designated under a land use by-law for use or intended use as a

> municipal public building, school facility, park or recreation facility and the municipal corporation does not own the land, the council shall
>
> (a) within 6 months from the date the land is so designated
>
> (i) acquire the land or require it to be provided as reserve land pursuant to this Act, or
>
> (ii) amend the land use by-law to designate the land for another use or intended use, or
>
> (b) within 6 months from the date the land is so designated commence proceedings to acquire the land or require it to be provided as reserve land and thereafter acquire it within a reasonable time.

Hartel subsequently brought an application for an order for mandamus requiring the City to commence acquisition proceedings.[203] The Court of Queen's Bench granted this application.[204] On appeal, the Alberta Court of Appeal vacated the lower court's order, with the majority holding that s.70(1) of the Planning Act only applied to situations where the municipality had designated private land for public use in a land use by-law.[205] Hartel appealed this decision to the Supreme Court of Canada, arguing, first, that the Court should construe s.70 as including designation by statutory plans, and, second, that the City of Calgary had acted in bad faith when it froze Hartel's land.[206]

The Supreme Court of Canada, in a judgment written by Madame Justice Wilson, dismissed Hartel's appeal.[207] The Court held that s.70(1) forced municipalities to acquire privately held land only when they had designated this land for public use in a land use by-law.[208] In arriving at this conclusion, the Court reviewed the structure of the Planning Act, noting that it contained an integrated scheme of planning documents in which each document played an assigned and discrete role in the planning process.[209] In the Court's view, statutory plans articulated land use proposals to which the municipality was committed in principle, while land use by-laws were the principal tools by which the municipality implemented these land use proposals.[210] In the Court's opinion, the interpretation of s.70(1) advocated by Hartel strained the language of s.70(1), was inconsistent with the different roles allotted statutory plans and land use by-laws, and ignored the legislative history of the Section.[211] The Court concluded that the compensation scheme included in the Planning Act was an exclusive one and did not encompass compensation for having land earmarked as a park in a statutory plan.[212]

The Court acknowledged that the City's actions had frozen further development of Hartel's land and deprived the company of commercial opportunities.[213] However, the Court noted that the Planning Act appeared to provide the

City of Calgary with the power to effect such a result, provided that it acted for a legitimate and valid planning purpose.[214] Citing the earlier decision of Soo Mill and Lumber Company Ltd. v. Sault Ste. Marie,[215] the Court held that there was nothing inherently wrong in the City's decision to impose a holding zone or development freeze for the purpose of preserving parkland.[216] The Court held that the City's actions did not evidence bad faith, distinguishing the present situation from that before the British Columbia courts in Hauff v. City of Vancouver.[217] In the latter case, the City of Vancouver had rezoned land in order to facilitate its later acquisition, whereas the City of Calgary had simply refused to rezone land or to buy out the company at a favourable price.[218]

One of the more important points to be drawn from the decision of Calgary City Council v. Hartel Holdings Ltd. is the extent to which the Supreme Court of Canada appears willing to countenance the regulation of individual property rights in the name of the "public interest". Like the late Chief Justice Laskin in Soo Mill and Lumber Company Ltd. v. Sault Ste. Marie,[219] Madame Justice Wilson in Hartel Holdings Ltd. endorsed the underlying rationale of land use planning.[220] In the course of her decision, Madame Justice Wilson indicated her acceptance of the general goals of the Alberta Planning Act and the importance it placed on the "greater public interest".[221] Madame Justice Wilson further stated that it was not the judiciary's function to interfere with the balance struck by the Legislature, and that any realignment between the interests of the public and the landowner could only be effected by that body.[222] The judiciary could only protect individuals from specific land use regulations which offended traditional administrative and common law principles.

It was also clear that the Court was concerned with preserving the flexibility of the planning process. Madame Justice Wilson, on behalf of the Court, provided a lengthy analysis of the separate functions of statutory plans and land use legislation, indicating that this separation was necessary in order to ensure that municipalities could continue to devise proposals for the management of urban growth without committing themselves to one specific course of action.[223] Had the Court held that s.70(1) of the Planning Act applied to the designation of land in a statutory plan as well as a land use by-law, a municipality's ability to plan for the provision of open space would have been severely curtailed. Given their fiscal resources, most municipalities could not afford to designate large areas of land for future use as parkland, knowing that they would have to initiate steps to acquire this land within a six-month period. By making a clear distinction between the function of statutory plans and those of land use by-laws, the Court ensured that Alberta municipalities could continue formulating long-range plans for controlling urban growth.

The facts of Calgary City Council v. Hartel Holdings Ltd.,[224] however, indicate that a municipality can use the planning process to strengthen its bargaining position with a landowner whose property has been earmarked for ultimate public use. Hartel had acquired its land knowing that it was subject to an agricultural land use classification. It quickly became apparent that the City of Calgary planned to develop part of Hartel's land into a park, and that the City would never change the land's zoning while it continued to back such plans. As a consequence, Hartel was left with three alternative courses of action, all of which required the company to absorb some financial loss. First, Hartel could keep its land and pay the associated carrying charges. Second, it could sell its land to a private individual or company at a price that might only reflect the land's value as an agricultural holding. Third, it could sell the land to the City at a price that was less than market value. The City, however, was prepared to prolong negotiations indefinitely while it tried to force Hartel to accept a less favourable price for its land. The case demonstrates how a municipality can use the planning process to exploit its position.

The decision of Calgary City Council v. Hartel Holdings Ltd.[225] should be contrasted with three lower court decisions and one planning board decision on holding zones. The decisions illustrate a variety of situations where the courts have not taken a liberal view of a municipality's regulatory powers, but rather have upheld the landowner's right to develop his property.

The first of these decisions is Duquette v. Port Alberni.[226] In this case, the plaintiffs owned two lots subject to a "one-family residential" designation.[227] The lots lay within the flood plain of the Somass River, an area that the Province of British Columbia and the City of Port Alberni had been studying with a view to enacting rigid development controls.[228] The City Council introduced two by-laws prohibiting development of land having an elevation of less than nine feet or within 100 feet of the natural boundary of the Somass River.[229] After objections from residents, the Council amended its proposals to permit construction of buildings on land having an elevation of less than nine feet. The other prohibition remained unchanged.[230] The plaintiffs' lots were less than 100 feet in depth, so the by-law froze development of the land.[231]

The plaintiffs sought an order quashing the by-law, alleging that it was prohibitory rather than regulatory in nature, and thus ultra vires the municipality's authority.[232]

The British Columbia Supreme Court granted the plaintiffs' application and quashed the by-law.[233] Although recognizing that a municipality could impose a total freeze on one type of development if it also permitted other uses, the Court found that the City had prohibited all forms of development on the plaintiffs' land.[234] The Court characterized the by-law's effect as "expropriation without compensation."[235]

The Court also found that the by-law was discriminatory.[236] It referred to the following principle established in the earlier decision of Re Rosling and Nelson:[237]

> ... once a zone has been established by a zoning by-law, council may prescribe for that zone as many different uses for the land and buildings therein as it sees fit. But whatever uses are prescribed apply to all within the zone. Council may not prescribe a use limited in application only to certain parcels of land in the zone and not applying to all the rest of the land in that particular zone.

The Court held that the City's by-law violated this principle because it applied the 100 foot restriction to only one of several one-family residential zones.[238]

The second decision, Karamanolis v. The Corporation of the District of Port Coquitlam, also dealt with a situation where the local planning authority effectively prohibited all forms of development.[239] Karamanolis had acquired one-half acre of land with the intention of constructing a restaurant, a use permitted under the land's "service commercial" designation.[240] Two years later Karamanolis applied for a building permit. He entered into discussions with the planning department and made an offer to purchase the needed road allowance from the City.[241]

The City, without warning, suddenly passed a by-law removing the "service commercial" designation and replacing it with a "one-family suburban residential" designation.[242] Agricultural operations and one-family homes on lots greater than one acre were the only permitted forms of development.[243] As a result, Karamanolis was precluded from developing his property in any form.

Statements by the city planner and an alderman indicated that the freeze on Karamanolis' land was temporary and stemmed from a concern with the growing strip development in the community.[244] By enacting a development moratorium, the City felt that it could acquire time in which to devise a comprehensive plan for urban development.[245]

Karamanolis made an application to quash the by-law on the grounds that it was passed in bad faith, was discriminatory, and was designed to prevent him from developing his property.[246] Karamanolis also sought an order for mandamus to force the development officer to issue him with a building permit.[247]

The British Columbia Supreme Court granted Karamanolis' application in part, quashing the by-law but adjourning the hearing to permit the building inspector to reconsider the building permit application.[248] The City appealed this decision, arguing that ss. 707A and 702(1)b of the Municipal Act, R.S.B.C. 1960, c.255 provided it with the power to impose a temporary holding zone. Section 707A provided a landowner with the right to appeal to the Minister if a zoning by-law prohibited any use of his land.[249] Section 702(1)b stated that a Council could regulate the use of land and buildings, and that the power to regulate entailed the power to "prohibit any particular use or uses in any specified zone."[250]

The British Columbia Court of Appeal agreed with the lower court's finding that the City had, in fact, imposed a holding zone.[251] However, the Court also held that the sections of the Municipal Act relied upon by the City did not grant British Columbia municipalities the power to prohibit all use of land.[252] As a consequence, by imposing a holding zone, the City had attempted to do indirectly what it could not do directly.[253] The Court, while admitting that such actions constituted bad faith, preferred to invalidate the by-law on the ground that the City had exceeded its statutory authority.[254]

In Tellefson v. Gloucester,[255] the Ontario Municipal Board discussed its power under s.35(22) of the Planning Act, R.S.O. 1970, c.349 (now s.34(10), Planning Act, S.O. 1983, c.1) to rezone land from a residential to a holding classification.[256] In this case, a local conservation group applied to the Municipal Board for the rezoning of property slated for residential development. The property in question included a woodland area, which the group wanted to preserve both for recreational and educational purposes.[257] The property was surrounded by residential development and was classified as a single family residential area under the proposed regional plan.[258]

Neither the town council nor the regional planning commission were prepared to acquire the property, largely because its development potential made the acquisition costs too great. As well, there was some evidence to suggest that the municipal and regional planners did not consider the woodland to be as unique an area as the conservation group alleged.[259] Nevertheless, the town council did agree to provide the conservation group with $25,000 if the group was able to raise the balance of the purchase price.[260] At the time of the application, the group had been unable to raise the money.[261]

The Board refused to rezone the land because of the potential conflict between placing the land under a holding zone and its proposed use for housing.[262] The Board stated that a holding zone was inappropriate under the circumstances since the purpose of a holding zone was to control the sequence of development.[263] The Board noted that the woodland was completely surrounded by urban development. It also pointed out that the town had recognized that the area was ripe for development since it had zoned the woodland for residential use.[264] In the Board's opinion, it would be incongruous to now place the woodland in a holding zone.[265]

Finally, in response to the conservation group's claim that the town had a right to impose a holding zone without paying the owner compensation, the Board stated:[266]

> I am of the opinion, that unless there is legislation specifically permitting this, that the Board should not normally countenance the downgrading of properties for the purpose of

> freezing development and thereby accomplishing its acquisition for a lesser sum, which is really what is being attempted in the subject circumstances. If there are other material considerations that would warrant this step, the Board should take them into consideration, but they are not present here.

The lower court decisions are distinguishable from the Supreme Court of Canada decisions of Soo Mill & Lumber Company Ltd. v. Sault Ste. Marie,[267] and Calgary City Council v. Hartel Holdings Ltd.[268] In these latter decisions the landowners, although prohibited from developing their land as they had originally planned, could put their properties to some alternative use. In Duquette v. Port Alberni,[269] and Karamanolis v. The Corporation of the City of Port Coquitlam,[270] however, the two landowners were prohibited from making any further use of their land whatsoever. The prohibitions created by the land use by-laws were complete because the physical characteristics of the properties ensured that no further development would take place. In contrast, the development freezes in the Supreme Court decisions were partially self-imposed. In each case, the company was presented with land use alternatives that they did not choose to pursue for economic reasons.

The Ontario Municipal Board decision of Tellefson v. Gloucester,[271] can also be distinguished from the Supreme Court decision of Soo Mill & Lumber Company Ltd. v. Sault Ste. Marie[272] on two grounds. In the latter case the land subject to the holding zone was apparently not ready for development when the City enacted its by-law. The use of the holding zone would therefore be justified as a legitimate means of regulating development. In Tellefson v. Gloucester,[273] the surrounding area was virtually fully developed and both the regional and local governments saw no sound planning or environmental reason for preserving the woodland. In addition, in Soo Mill & Lumber Company Ltd. v. Sault Ste. Marie,[274] the landowner was provided with alternative uses for its property. In Tellefson v. Gloucester,[275] the proposed holding zone would have curtailed all further development since the property was to be left in its natural state. In essence, the landowner would have been required to dedicate his land to the community without receiving any compensation or necessarily benefiting in other ways from the creation of a park.

The decision of Tellefson v. Gloucester,[276] is less readily distinguished from the Supreme Court decision of Calgary City Council v. Hartel Holdings Ltd.[277] In both cases, the landowners held property in areas of growing urban development. Both could therefore expect that their properties would also be developed for residential use. However, in each case, the landowner was faced with the prospect of having its property placed in a holding zone for an indefinite period of time without receiving any immediate compensation. The Ontario Municipal Board was not prepared to countenance the imposition of a holding zone under such circumstances because it entailed a virtual expropriation of the landowner's property rights. The Supreme Court of Canada did not view the City of Calgary's actions in the same light, stating the development freezes and holding zones were valid planning tools.

In a fourth decision, Allarco Developments Ltd. v. The Council of the County of Lacombe; Parent-Organization Michener Centre v. The Council of the County of Lacombe, the Alberta Court of Queen's Bench also adopted a different view of development freezes from that of the Supreme Court of Canada.[278]

In 1975, the two plaintiff organizations had each acquired land fronting Sylvan Lake in the County of Lacombe. At the time of acquisition, this land had been zoned "agricultural" but was rezoned as "A-A Agricultural Amenity" by 1978.[279] Under this latter land use classification, land development was frozen at its current level, parcel sizes were restricted to those then registered at the Land Titles Office, and the removal of vegetation was strictly controlled.[280]

Both plaintiffs had applied for rezoning of their respective properties prior to the enactment of the amending by-law. However, the County of Lacombe had rejected these applications on the grounds that the developments would conflict with the terms of the proposed land use by-law.[281] Parent-Organization launched two more applications for rezoning which the Council of the County of Lacombe refused.[282] Parent-Organization then appealed to the Development Appeal Board. After receiving an unfavourable decision from that body, the two plaintiffs launched separate actions to quash the County's by-law on the basis that it was discriminatory, biased, made in bad faith, and deprived them of any meaningful opportunity to develop their lands.[283]

The underlying motivation of the County of Lacombe's actions was a desire to preserve the shoreline of Sylvan Lake for future public park and recreational use. As early as 1972, the Red Deer Planning Commission had expressed concern about the growing intensity of recreational and residential development around Sylvan Lake and had urged the Provincial Government to purchase lakeshore lands for public use.[284] After learning that the Provincial Government did not intend to purchase any of these lands, the Red Deer Planning Commission embarked on its own land management study of the area. This latter study culminated in the passage of the land use by-law restricting further development near Sylvan Lake.[285]

After reviewing the evidence, the Court of Queen's Bench found that the County's sole purpose in enacting the by-law was to establish a holding zone which would freeze development of the plaintiffs' lands, thereby reserving them for future public use.[286] In the Court's view, the County's actions amounted to the "quasi-expropriation" of the plaintiffs' property rights since they had been deprived of any meaningful use and development of their lands.[287] After reviewing the provisions of the Planning Act, R.S.A. 1980, c.P-9, the Court found that the legislation provided specific methods by which a planning authority could reserve private land for public use.[288] The Court also noted that all these methods required the planning authority to compensate the private landowner.[289] In the Court's opinion, the County of Lacombe had tried to evade its obligations under the provincial planning legislation by using its general regulatory powers to freeze private land development.[290] The Court held that such actions amounted to an abuse of authority and evidenced bad faith.[291] As a result, the Court declared invalid those parts of the by-law referring to "A-A Agricultural Amenity" zones.[292]

At first glance, it is difficult to reconcile the decisions of Allarco Developments Ltd.[293] and Calgary City Council v. Hartel Holdings Ltd.[294] In each case, the local planning authority had frozen development by using its general regulatory powers to deprive the landowners of their development opportunities. In Calgary City Council v. Hartel Holdings Ltd.[295] the City of Calgary achieved this end by refusing to rezone the land on the company's request, while in Allarco Developments Ltd.[296] the County of Lacombe enacted a new land use by-law which was more restrictive than the original one. The motive in both cases was the same - to preserve privately held land in its natural state for later use as a park or recreational area. Yet, in Calgary City Council v. Hartel Holdings Ltd.[297] the Supreme Court of Canada held that the City of Calgary's actions were valid, whereas in Allarco Developments Ltd.[298] the Alberta Court of Queen's Bench found that the County of Lacombe had acted in bad faith.

The conflicting decisions can perhaps be explained by the slightly different positions of the two landowners. In Calgary City Council v. Hartel Holdings Ltd.,[299] the company had acquired its property knowing that the current zoning did not permit residential development. It therefore assumed the risk that the City of Calgary would never allow the type of development it proposed for the area. Its subsequent court action, in part, represented an attempt to force the City of Calgary to buy its property at near market value.

In Allarco Developments Ltd.,[300] the company's position was slightly stronger since the County of Lacombe had enacted more restrictive zoning after Allarco had bought its properties. In addition, there was considerable evidence to suggest the County of Lacombe had enacted its new zoning by-law after it learned that the Provincial government did not plan to purchase the land for park purposes. In this respect, the facts parallel those of Hauff v. City of Vancouver[301] and Re Rodenbush and District of North Cowichan.[302]

These cases on holding zones and development freezes illustrate the various positions of the Canadian judiciary towards the validity of these planning devices. Clearly, municipal councils and other local planning bodies can impose holding zones and development freezes to regulate the rate and form of urban development and ensure that such development is fiscally sound. It is also possible for local planning bodies to preserve certain land for park if, as in Calgary City Council v. Hartel Holdings Ltd.,[303] they merely refuse to upgrade zoning in an area experiencing increasing urban growth. Moreover, it may be possible for a local planning body to impose a development freeze by altering the area's zoning, provided there is no evidence suggesting that the planning body is attempting to avoid expropriating or acquiring the land in question. Where there is evidence of this nature, the Canadian judiciary will be more likely to invalidate the local planning body's actions. In this situation, the success of the planning body's actions will depend both on the circumstances and on the initial decision of the court to liberally or strictly construe the planning legislation.

3. Environmental Regulation

There have been few decisions in which a private landowner has challenged the validity of regulatory actions placing his land under some form of protected area classification. In two reported decisions, Prevost Investments & Developments Ltd. v. P.E.I.[304] and Heppner v. The Minister of the Environment,[305] the landowners successfully challenged special area classifications on the grounds that the relevant environmental legislation did not authorize specific governmental actions. In a third unreported decision, Reinhold Trelenberg v. The Minister of the Environment (Alberta),[306] a landowner argued unsuccessfully that the Minister of the Environment had violated ss.1(a) and 2 of the Alberta Bill of Rights by placing his land under Restricted

Development Area classification. The decision of the Alberta Court of Queen's Bench is particularly interesting because it discusses at length the issue of whether the individual has an inherent common law right of compensation.

Mr. Trelenberg owned certain land within the Edmonton Restricted Development Area which was zoned as low-density agricultural.[307] In November, 1977, Trelenberg applied for a zoning change which would permit him to develop his land for intensive residential use. The City of Edmonton Planning Department referred the application to the Department of the Environment, which rejected the application on the grounds that the rezoning and subsequent development of the land would be incompatible with the overall purpose of the Edmonton Restricted Development Area.[308]

Trelenberg applied to the Court of Queen's Bench for an order declaring the relevant Order-in-Council invalid as being contrary to ss. 1(a) and 2 of the Alberta Bill of Rights.[309] These sections provide as follows:

> 1. It is hereby recognized and declared that in Alberta there exists without discrimination by reason of race, national origin, colour, religion or sex, the following fundamental freedoms, namely:
>
> (a) the right of the individual to liberty, security of the person and

> enjoyment of property, and the right not to be deprived thereof except by due process of law
>
> 2. Every law of Alberta shall, unless it is expressly declared by an Act of the Legislature that it operates notwithstanding The Alberta Bill of Rights, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared.

Specifically, Trelenberg advanced the following arguments: the provincial legislation and accompanying regulations amounted to a specific dedication of private land to public use;[310] Trelenberg had been deprived of his property without due process because the regulations did not provide for compensation in a situation where the law normally required compensation;[311] and the regulations themselves constituted an expropriation which was subject to either the Expropriation Act or the Proceedings Against the Crown Act.[312]

The Alberta Court of Queen's Bench dismissed Trelenberg's action and upheld the validity of the Order-in-Council which placed his land within the Restricted Development Area.[313] After reviewing the Canadian decisions respecting the interpretation of s.1 of the Canadian Bill of Rights, the Court held that the provincial legislation did not create new rights, but only protected those rights in existence at the time of its enactment.[314]

After discussing various Canadian and Commonwealth decisions respecting compensation for injurious affection to property rights, the Court further held that the law did not require a local planning body to compensate a landowner for placing restrictions on the use of his property and causing its devaluation.[315] As a consequence, the Alberta Bill of Rights did not provide Mr. Trelenberg with a right to claim compensation from the Department of the Environment.

In a subsidiary part of its judgment, the Court distinguished the Supreme Court of Canada decision of Manitoba Fisheries Ltd. v. The Queen.[316] In that decision, the Supreme Court of Canada had stated that the judiciary should not construe legislation so as to permit a governmental body to take an individual's property without compensating him.[317] However, the Alberta Court of Queen's Bench distinguished this decision on the grounds that it had concerned the actual transfer of property to the government, and that the legislation under review by the Supreme Court of Canada had been sufficiently ambiguous as to permit an interpretation favourable to the landowner.[318] In the Court's opinion, the regulations enacted under the Department of the Environment Act did not effect a taking of property, although they did destroy Mr. Trelenberg's enjoyment of his property rights.[319] Further, by providing landowners with a right of compensation in certain circumstances, the Department of Environment had meant to preclude the possibility of compensation when land was included in a Restricted Development Area.[320]

The decision of Reinhold Trelenberg v. The Minister of the Environment (Alberta),[321] is a significant one. It is one of the few decisions in which Canadian courts have discussed whether the individual has a common law right to claim compensation for the devaluation of his property. It is also one of the few decisions to address the question of compensation for adverse regulatory changes in light of the Federal and provincial bills of rights. This latter discussion may be particularly relevant in light of the recent Supreme Court of Canada decision in Re Singh and the Minister of Employment and Immigration.[322] There, certain members of the Court indicated that the Federal and provincial bills of right might be available to protect individual rights and liberties not expressly guaranteed by the Canadian Charter of Rights and Freedoms.[323] One such right may prove to be the right not to be deprived of property except by due process of law since it is not expressly protected by s.7 of the Charter.

For this reason, it is interesting to note the distinction that the Alberta Court of Queen's Bench made between the "taking" of property rights and the regulation of these rights by federal, provincial, and local governments. The Court quoted at length from the House of Lord's decision of Belfast Corporation v. O.D. Cars Ltd.[324], a case which revolved around the issue of whether the devaluation of property resulting from regulatory change constituted a "taking" of property within the meaning of the Irish Constitution. The House of Lords held that the control, impairment, and diminution of property rights did not constitute a taking.[325] The Alberta Court of Queen's Bench then cited a passage from 10 Halsbury (3d), concerning the distinction between "negative prohibitions" and "takings":[326]

> The right to compensation can only arise (if it does arise) where the subject's property is actually taken possession of, or used by, the government, or where, by order of a competent authority, it is placed at the disposal of the government. A mere negative prohibition, although it involves interference with an enjoyment of property, does not, merely because it is obeyed, carry with it at common law, any right of compensation.

Finally, the Court itself drew a distinction between governmental regulations which deprive the individual of the full enjoyment of his property rights and those which cause a de facto expropriation.[327] The Court concluded that the inclusion of land in a Restricted Development Area did not constitute a "taking" or virtual expropriation of land, although it had caused Mr. Trelenberg to lose the enjoyment of his property.[328]

This distinction is important in light of the Court's discussion of the right of compensation at common law and under the Federal and provincial bills of rights. The Court, in accordance with the dominant Anglo-Canadian view, held that the individual has no inherent common law right of compensation, but must base that right on statute.[329] Yet the Court also acknowledged that a second line of jurisprudence existed with respect to the question of the individual's common law right of compensation. This jurisprudence, typified by the Supreme Court of Canada decision of Manitoba Fisheries Ltd. v. The Queen,[330] holds that the courts should protect the individual from legislation expropriating property rights by presuming that the legislature does not intend to take these rights without granting compensation. This presumption, however, operates only if the legislature purports to "take" property rights. It does not apply to zoning by-laws which merely govern the way in which an individual uses his property. According to the Alberta Court of Queen's Bench, this position is unchanged by the Alberta Bill of Rights since it, like the Canadian Bill of Rights, only protects those rights in existence at the time of its enactment.[331] Therefore, at common law and under the Federal and provincial bills of rights the individual's right of compensation is limited and dependent upon a rule of statutory interpretation.

C. Conclusion

A review of the major Canadian cases on downzoning, holding zones, and provincial environmental legislation shows how varied the judicial response has been towards land use regulations which restrict property rights. Downzoning and holding zones have been sanctioned by the Supreme Court of Canada in Township of Scarborough v. Bondi[332] and Soo Mill and Lumber Company Ltd. v. Sault Ste. Marie.[333] The recent decision of Calgary City Council v. Hartel Holdings Ltd.[334] indicates the extent to which the Supreme Court of Canada is prepared to countenance the regulation of property rights, provided that the local or provincial planning authority does not exceed its jurisdiction by acting in bad faith or in a discriminatory manner.

The lower courts have, in general, been more critical of the methods adopted by local planning authorities and, in particular, have invalidated their attempts to preserve privately-held land for parkland by downzoning it or placing it in a holding zone. While in many instances, the courts' decisions have rested on the particular facts of each case, it is equally apparent that these decisions reflect a stricter view of the regulatory powers of local planning authorities. This approach is evident in decisions such as Hauff v. The City of Vancouver,[335] Re Rodenbush and the District of North Cowichan[336] and Allarco Developments Ltd. v. The Council of the County of Lacombe[337] where the lower courts have held downzoning and holding zones to have virtually expropriated privately-owned land.

In further contrast to these decisions is that of Trelenberg v. The Minister of the Environment (Alberta).[338] In that case, the Alberta Court of Queen's Bench rejected Re Rodenbush and The District of North Cowichan,[339] and Hauff v. City of Vancouver[340] as authorities for determining whether or not the designation of land as a Restricted Development Area pursuant to provincial environmental legislation constituted quasi-expropriation.[341] Instead, the Court held that the Order-in-Council designating Mr. Trelenberg's land amounted to no more than a zoning by-law and consequently had not "taken" the plaintiff's land.[342] This decision, therefore, casts some doubt on the earlier decisions of the British Columbia courts and suggests that they should be limited to their particular set of facts.

ENDNOTES

1 F. Parkinson, Q.C., "Downzoning-Fair or Foul?" in Canadian Bar Association, *Proceedings of the Third Annual Institute on Continuing Legal Education, Municipal Law* (1978) 3.

2 *Id*. at 5.

3 A survey of the principal arguments for compensating landowners for a loss in property values resulting from regulatory changes can be found in Gordon C. Bjork, *Life, Liberty and Property, The Economics of Land Use Planning and Environmental Controls* (1980); Donald R. Denman, *The Place of Property* (1978); Donald G. Hagman and Dean J. Misczynski, eds., *Windfalls for Wipeouts* (1978) Jack L. Knetsch, *Property Rights and Compensation: Compulsory Acquisition and Other Losses* (1983); Robert C. Ellickson, "Suburban Growth Controls: An Economic and Legal Analysis" (1977) 86 *Yale L.J.* 385.

4 Knetsch, *Property Rights and Compensation*, *supra* n.3 at 98; Ellickson, "Suburban Growth Controls," *supra* n.3 at 420.

5 Knetsch, *Property Rights and Compensation*, *supra* n.3 at 101.

6 *Id*.

7 *Id*.

8 *Id*.

9 *Id*.

10 Dean J. Miscyzinski, "Land Use Controls and Property Values" in Hagman and Misczynski, eds, *Windfalls for Wipeouts*, *supra* n.3 at 97.

11 *Id*.

12 Michael Trebilcock and John Quinn, "Compensation, Transition Costs, and Regulatory Changes" (1982) 32 *U. of T. L.J.*, 117 at 156-60.

13 Knetsch, *Property Rights and Compensation*, *supra* n.3 at 102.

14 Robert C. Ellickson, "Suburban Growth Controls" supra n.3 at 420-422; Jack L. Knetsch, Property Rights and Compensation, supra n.3 at 102; K.C. Willis, The Economics of Town and Country Planning (1980) 62-64.

15 William Stoebuck, "Police Power, Takings and Due Process" (1980) 37 Washington and Lee Law Review 1055 at 1084-85.

16 Id. at 1085-87.

17 Id. at 1087.

18 Robert C. Ellickson, "Suburban Growth Controls," supra n.3 at 420-422; Jack L. Knetsch, Property Rights and Compensation, supra n.3 at 102; K.C. Willis, The Economics of Town and Country Planning (1980) 62-64.

19 Robert C. Ellickson, "Suburban Growth Controls," supra n.3 at 420, 422; Frank I. Michelman, "Property, Utility, and Fairness: Comments on the Ethical Foundation of 'Just Compensation' Law," (1967) 80 Harvard Law Review 1167; Joseph P. Sax, "Takings and the Police Power" (1969) 74 Yale L.J., 36; A. Dunham, "Griggs v. Allegheny County in Perspective- Thirty Years of Supreme Court Compensation Law," (1962) Sup. Ct. Review 63.

20 See Chapter I n.3ff

21 Ellickson, "Suburban Growth Controls," supra n.3 at 422.

22 Id. at 421.

23 Michelman, "Property, Utility, and Fairness," supra n.19 at 1223.

24 This example is modelled on the facts of Karamanolis v. The Corporation of the District of Port Coquitlam (1978) 8 B.C.L.R. 282, aff'g 3 M.P.L.R 111, 3 B.C.L.R. 341.

25 (1978) 8 B.C.L.R. 282 at 283-24.

26 Trebilcock and Quinn, "Compensation, Transition Costs and Regulatory Change," supra n.12 at 153-155.

27 Planning Act, S.O. 1983, c.1, s.35(2).

28 Planning Act, R.S.A. 1980, c. P-9, s.72.

29 Planning Act, S.N.S. 1983, P-15, s.74(1).

30 For example, Municipal Act, R.S.B.C. 1979, c. 290, s.723; Planning Act, S.M. 1975, c.29, s.88(14); The Planning and Development Act, R.S.S. 1983, c. P-13, s.198, The Planning Act, S.N.S. 1983, c.9, s.1, s.107.

31 The effects of urban development on local industry is reviewed by James D. McRae, *The Influence of Exurbanite Settlement on Rural Areas, A Review of the Canadian Literature* (Lands Directorate, Environment Canada Working Paper No. 3, 1980).

32 J.D. McCuaig and E.W. Manning, *Agricultural Land-use Change in Canada: Process and Consequences* (Lands Directorate Environment Canada: Ottawa, 1982) 61-64.

33 *Id*.

34 Dean J. Misczynski, "Land Use Controls and Property Values," in Hagman and Misczynski, eds., *Windfalls for Wipeouts*, *supra* n.3 at 97.

35 Trebilcock and Quinn, "Compensation, Transition Costs and Regulatory Change," *supra* n.12 at 156-60.

36 *Calgary City Council* v. *Hartel Holdings Ltd*. (1984) 8 D.L.R. (4th) 321, (1984) 25 M.P.L.R. 245, [1984] 4 W.W.R. 193, 53 A.R. 175, 31 Alta. L.R. (2d) 97 (S.C.C.).

37 *Id*.

38 The Agricultural Land Commission Act, R.S.B.C. 1979, c.9.

39 Historical Resources Act, R.S.A. 1980, c. H-8.

40 The Wilderness and Ecological Reserves Act, S.N. 1980, c.2.

41 The Department of Environment Act, R.S.A. 1980, c.D-19.

42 The Wilderness and Ecological Reserves Act, S.N. 1980, c.2.

43 Agricultural Land Commission Act, R.S.B.C. 1979, c.9, s.8; Agricultural Land Preservation Act, S.Q. 1978, c.10, s.26.

44 The Department of Environment Act, R.S.A. 1980, c.D-19,s.18.

45 Alta. Reg. 287/74, s.5(2).

46 _Id_., s.5(2)(a).

47 The Agricultural Land Commission Act, R.S.B.C. 1979, c.9, s.8.

48 Edward W. Manning an Sandra S. Eddy, _The Agricultural Land Reserves of British Columbia: An Impact Analysis_ (Lands Directorate Environment Canada: Ottawa, 1978) 3-6.

49 _Id_. at 91-94.

50 Willis, _Town and Country Planning_, _supra_ n.14 at 83. Willis states that land in the City of London's greenbelt area has a capitalised value of £1400 per acre (comprised of amenity and agricultural value), while its value as residential land is £39,000 per acre.

51 Francis Vaillancourt and Luc Monty, "The Effect of Agricultural Zoning on Land Prices in Quebec, 1975-81" (1985) 61 _Land Economics_ 1 at 41-42.

52 Manning and Eddy, _The Agricultural Land Reserves_, _supra_ n.48 at 91-94.

53 R.S.A. 1980, c.H-8, s.24.

54 R.S.Q. c.B-4, s.33; Q.R.R. c.B-4, r.3, s.(2) and (3).

55 R.S.A. 1980, c.D-19, s.18.

56 Special Places Protection Act, S.N.S. 1980, c.17, s.1, s.20(1); Development Areas (Lands) Act, R.N.S. 1970, c.95, s.5(1); Agricultural Land Commission Act, R.S.B.C. 1979, c.9, s.25.

57 [1959] S.C.R. 444, 18 D.L.R. (3d) 161.

58 [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1, 2 N.R. 429.

59 Calgary City Council v. Hartel Holdings Ltd. (1984) 8 D.L.R. (4th) 321, [1984] 4 W.W.R.193, 53 A.R. 175, 31 Alta. L.R. (2d) 97.

60 Monarch Holdings Ltd. v. Corporation of the District of Oak Bay et al. (1977) 79 D.L.R. (3d) 59, 4 M.P.L.R. 147, 4 B.C.L.R. 67.

61 Re Corporation of District of North Vancouver Zoning By-Law 4277 [1973] 2 W.W.R. 260; Karamanolis v. Corporation of the City of Port Coquitlam (1978), 8 B.C.L.R. 282, aff'g 3 M.P.L.R. 111, 3 B.C.L.R. 341; Hauff v. City of Vancouver (1980) 12 M.P.L.R. 125 (B.C.S.C.), aff'g (1981) 15 M.P.L.R. 8, 28 B.C.L.R. 276, 24 L.C.R. 109 (C.A.).

62 [1959] S.C.R. 444, 18 D.L.R. (2d) 161.

63 [1958] 25 W.W.R. 167.

64 Id.

65 Id.

66 Id. at 167-168.

67 Id. at 168.

68 Id. at 168-69.

69 Id. at 169.

70 [1959] S.C.R. 444, 18 D.L.R. (2d) 161.

71 (1959) 18 D.L.R. (2d) 161 at 165.

72 Id.

73 Id.

74 Id.

75 Id.

76 Id.

77 Id.

78 Id. at 167.

79 Id. at 166.

80 Id.

81 Id.

82 (1977) 79 D.L.R. (3d) 59, 4 M.P.L.R. 147, 4 B.C.L.R. 67.

83 (1977) 4 B.C.L.R. 67 at 68.

84 Id. at 69.

85 Id.

86 Id.

87 Id. at 70.

88 Id.

89 Id. at 71.

90 Id.

91 Id. at 86.

92 Id. at 93.

93 Id.

94 Id. at 94.

95 Id.

96 Id.

97 (1959) 18 D.L.R. (2d) 161 at 166

98 Id.

99 (1977) 4 B.C.L.R. 67 at 94.

100 (1959) 18 D.L.R. (2d) 161 at 165.

101 (1977) 4 B.C.L.R. 67 at 94

102 Id. at 71.

103 (1959) 18 D.L.R. (2d) 161.

104 (1977) 4 B.C.L.R. 67.

105 [1973] 2 W.W.R. 260.

106 Id. at 261.

107 Id.

108 Id. at 262.

109 Id. at 263.

110 Id. at 264.

111 Id.

112 Id.

113 Id.

114 Id. at 266.

115 Id.

116 Id.

117 Id.

118 (1974) 49 D.L.R. (3d) 123, [1974] 5 W.W.R. 735.

119 (1974) 49 D.L.R. (3d) 123 at 124.

120 Id. at 125.

121 Id.

122 Id.

123 Id. at 127.

124 Id.

125 Id. at 130.

126 Id.

127 Id. at 130.

128 Id.

129 Id.

130 (1959) 18 D.L.R. (2d) 161.

131 (1977) 4 B.C.L.R. 67.

132 (1977) 76 D.L.R. (3d) 731.

133 Id.

134 Id. at 732.

135 Id.

136 Id. at 733.

137 Id. at 732-33.

138 Id. at 734.

139 Id.

140 Id.

141 Id.

142 Id.

143 Id. at 735.

144 Id. at 731.

145 Id. at 736.

146 Id. at 735.

147 Id. at 736.

148 Id.

149 Id.

150 (1959) 18 D.L.R. (2d) 161.

151 (1977) 4 B.C.L.R. 67.

152 (1959) 18 D.L.R. (2d) 161.

153 (1981) 15 M.P.L.R. 8, 28 B.C.L.R. 276, 24 L.C.R. 109 (C.A.) aff'g (1980) 12 M.P.L.R. 125 (B.C.S.C.).

154 (1980) 12 M.P.L.R. 125 at 130.

155 Id.

156 Id. at 133.

157 Id. at 126.

158 Id. at 127.

159 Id. at 140.

160 Id. at 136.

161 Id.

162 Id. at 139.

163 Id. at 140.

164 (1981) 15 M.P.L.R. 8 at 11.

165 Id. at 13.

166 Id.

167 Id.

168 (1980) 12 M.P.L.R. 125 at 136; (1981) 15 M.P.L.R. 8 at 13.

169 [1973] 2 W.W.R. 261.

170 (1974) 49 D.L.R. (3d) 123.

171 (1981) 15 M.P.L.R. 8, 28 B.C.L.R. 276, 24 L.C.R. 109 (C.A.) aff'g (1980) 12 M.P.L.R. 125 (B.C.S.C.).

172 (1977) 76 D.L.R. (3d) 731 at 736.

173 [1973] 2 W.W.R. 261 at 266.

174 (1980) 12 M.P.L.R. 125 at 140.

175 [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1, 2 N.R. 429.

176 Calgary City Council v. Hartel Holdings Ltd. (1984) 8 D.L.R. (4th) 321, (1984) 25 M.P.L.R. 245, [1984] 4 W.W.R. 193, 53 A.R. 175, 31 Alta. L.R. (2d) 97 (S.C.C.).

177 [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1, 2 N.R. 429.

178 [1975] 2 S.C.R. 78 at 81.

179 Id. at 81.

180 Id. at 80.

181 Id. at 81.

182 Id. at 80.

183 Id. at 81.

184 [1974] 2 O.R. 110.

185 [1975] 2 S.C.R. 78 at 85.

186 Id. at 82-83.

187 Id. at 84.

188 Id.

189 Id.

190 [1975] 2 S.C.R. 78.

191 Id.

192 (1984) 8 D.L.R. (4th) 321, (1984) 25 M.P.L.R. 245, [1984] 4 W.W.R. 193, 53 A.R. 175, 31 Alta. L.R. (2d) 97 (S.C.C.), aff'g (1982) 131 D.L.R. (3d) 722, 17 M.P.L.R. 87, 36 A.R. 76, 18 Alta. L.R. (2d) 1.

193 (1984) 25 M.P.L.R. 245 at 250-251.

194 Id. at 250.

195 Id.

196 Id.

197 Id. at 252.

198 Id.

199 Id. at 257.

200 Id. at 250.

201 Id. at 252.

202 Id.

203 Id. at 253.

204 Id.

205 (1982) 131 D.L.R. (3d) 722, 17 M.P.L.R. 87, 36 A.R. 76, 18 Alta. L.R. (2d) 1.

206 (1984) 25 M.P.L.R. 245 at 254, 263.

207 Id. at 264.

208 Id. at 258-59.

209 *Id*. at 254.

210 *Id*. at 254, 258-59.

211 *Id*. at 262.

212 *Id*. at 262-63.

213 *Id*. at 263.

214 *Id*.

215 [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1, 2 N.R. 429.

216 (1984) 25 M.P.L.R. 245 at 264.

217 (1981) 15 M.P.L.R. 8, 28 B.C.L.R. 276,24 L.C.R. 104.

218 (1984) 25 M.P.L.R. 45 at 264.

219 [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1, 2 N.R. 429.

220 (1984) 25 M.P.L.R. 45 at 264.

221 *Id*. at 263.

222 *Id*.

223 *Id*. at 258-59.

224 (1984) 8 D.L.R. (4th) 321, (1984) 25 M.P.L.R. 245, [1984] 4 W.W.R. 193, 53 A.R. 175, 31 Alta. L.R. (2d) 97 (S.C.C.), aff'g (1982) 131 D.L.R. (3d) 722, 17 M.P.L.R. 87, 36 A.R. 76, 18 Alta. L.R. (2d) 1.

225 *Id*.

226 (1978) 3 M.P.L.R. 177 (B.C.S.C.).

227 *Id*. at 180.

228 *Id*. at 181.

229 *Id*.

230 *Id*. at 184.

231 *Id*. at 188.

232 *Id*. at 186.

233 *Id*. at 192.

234 Id. at 188.

235 Id.

236 Id.

237 (1967) 64 D.L.R. (2d) 82 at 187.

238 Id. at 188.

239 (1978) 8 B.C.L.R. 282, aff'g (1977) 3 M.P.L.R. 111, 3 B.C.L.R. 341.

240 (1978) 8 B.C.L.R. 282 at 283.

241 Id.

242 Id. at 284.

243 Id.

244 Id.

245 Id. at 283.

246 (1977) 3 M.P.L.R. 111.

247 Id.

248 Id. at 112.

249 The full text of the provision reads:

> 707A Where, subsequent to the acquisition of land by a person, a zoning by-law is adopted or amended so that no use of the land is permitted, that person may, if not granted relief by the Board of Variance, appeal to the Minister who may, by order binding on the municipality, grant relief as he considers proper.

250 The full text of the provision reads:

> 702(1) The Council may by by-law
>
> (b) regulate the use of land, buildings, and structures, including the surface of water, within such zones, and the regulations may be different for different zones and for different uses within a zone, and for the purposes of this clause the power to regulate includes the power to prohibit any

particular use or uses in any specified zone or zones.

251 (1978) 8 B.C.L.R. 282 at 284.

252 Id. at 286.

253 Id. at 285.

254 Id. at 285-86.

255 (1976) 1 M.P.L.R. 11, 6 O.M.B.R. 206 (O.M.B.).

256 Section 35(22) provides:

> Where an application to the council for an amendment to a by-law passed under this section or a predecessor of this section,
> ...
> is refused or the council refuses or neglects to make a decision thereon within one month after the receipt of the clerk of the application, the applicant may appeal to the Municipal Board and the Municipal Board shall hear the appeal and dismiss the same or direct that the by-law be amended in accordance with its order.

257 (1976) 1 M.P.L.R. 11 at 21.

258 Id.

259 Id. at 20-22.

260 Id. at 21.

261 Id.

262 Id. at 22.

263 Id.

264 Id. at 23.

265 Id. at 24.

266 Id.

267 [1975] 2 S.C.R. 78.

268 (1984) 25 M.P.L.R. 245.

269 (1977) 3 M.P.L.R. 177.

270 (1978) 8 B.C.L.R. 282.

271 (1976) 1 M.P.L.R. 11.

272 [1975] 2 S.C.R. 78.

273 (1976) 1 M.P.L.R. 11.

274 [1975] 2 S.C.R. 78.

275 (1976) 1 M.P.L.R. 11.

276 Id.

277 (1984) 25 M.P.L.R. 245.

278 Unreported, J.D. of Red Deer, Q.B. 70910-00590, 145332 Alta. Q.B.

279 Id. at 7.

280 Id.

281 Id. at 6-7.

282 Id. at 7.

283 Id.

284 Id. at 3.

285 Id. at 6.

286 Id. at 9.

287 Id.

288 Id. at 17.

289 Id.

290 Id.

291 Id. at 16.

292 Id. at 18.

293 Q.B. 70910-00590 and 145332.

294 (1984) 25 M.P.L.R. 245.

295 Id.

296 Q.B. 70910-00590 and 145332.

297 (1984) 25 M.P.L.R. 245.

298 Q.B. 70910-00590 and 145332.

299 (1984) 25 M.P.L.R. 245.

300 Q.B. 70910-00590 and 145332.

301 (1981) 15 M.P.L.R. 8.

302 (1977) 76 D.L.R. (3d) 731.

303 (1984) 25 M.P.L.R. 245.

304 (1979) 89 D.L.R. (3d) 308 (P.E.I.S.C.).

305 (1978) 4 A.L.R. 139 (C.A.).

306 Unreported, J.D. of Edmonton, Q.B. 104637 and 107234 (Q.B.).

307 _Id_. at 1.

308 _Id_. at 2.

309 _Id_. at 8.

310 _Id_.

311 _Id_. at 11.

312 _Id_. at 12.

313 _Id_. at 33.

314 _Id_. at 12.

315 _Id_. at 32.

316 [1979] 1 S.C.R. 101.

317 [1979] 1 S.C.R. 101 at 118.

318 Q.B. 104637 and 107234 at 33.

319 _Id_. at 32-33.

320 _Id_. at 33.

321 Q.B. 104637 and 107234.

322 (1985) 17 D.L.R. (4th) 422.

323 (1985) 17 D.L.R. (4th) 422 at 429-30.

324 [1960] All E.R. 65 (H.L.) at 69, 73.

325 _Id_. at 69.

326 Q.B. 104637 and 107234 at 24-25.

327 _Id_. at 33.

328 _Id_. at 32-33.

329 Eric C. Todd, _Law of Expropriation and Compensation in Canada_ (1976) 25.

330 [1979] 1 S.C.R. 101.

331 Q.B. 104637 and 107234 at 12.

332 [1959] S.C.R. 444, 18 D.L.R. (2d) 161.

333 [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1, 2 N.R. 429.

334 (1982) 131 D.L.R. (3d) 722, 17 M.P.L.R. 87, 36 A.R. 76, 18 Alta. L.R. (2d) 1.

335 (1981) 15 M.P.L.R. 8, 28 B.C.L.R. 276, 24 L.C.R. 109 (C.A.)

336 (1977) 76 D.L.R. (3d) 731.

337 Q.B. 7910-005-90 and 145332.

338 Q.B. 104637 and 107234.

339 (1977) 76 D.L.R. (3d) 731.

340 (1981) 15 M.P.L.R. 8, 28 B.C.L.R. 276, 24 L.C.R. 109 (C.A.).

CHAPTER IV: RESTRICTIONS ON THE RIGHTS OF PROPERTY OWNERS: SUBDIVISION EXACTIONS

A. Overview Of The Powers Available To Local Planning Authorities

Municipal governments derive their powers to impose subdivision exactions from provincial planning and land titles legislation. In some cases, planning legislation itself obliges the potential developer to seek permission from a planning official before subdividing his land. The Planning Act, S.O. 1983, c.1 is typical of this form of legislation. Sections 49(3) and (5) prohibit developers in Ontario from subdividing their land and selling lots without the approval of the Minister of Municipal Affairs. Similarly, ss. 100(1) and 101(1) of the Planning Act, S.N.S. 1983, c.9 provide that the subdivision of land is ineffective unless the landowner or developer obtains the approval of a development officer and subsequently files an approved plan in a registry office.

In other cases, the combined effect of planning legislation and the registration requirements of land titles legislation compel the developer to seek subdivision approval. For example, s.86(1) of the Planning Act, R.S.A. 1980, c.P-9 merely prohibits the Registrar of Land Titles from accepting instruments subdividing land for registration unless the subdivision plan has received approval from the subdivision authority. Registration of a subdivision plan under ss.56(1) and 89(1) of the Land Titles Act, R.S.A. 1980, c.L-5 permits the developer to deal with the land and to pass title in specific lots. Therefore, as a practical matter, the developer must obtain subdivision approval if he wants to be able to sell the lots in the subdivision.[1]

In return for granting approval, subdivision approving authorities require developers to provide infrastructure to service the new and existing community, land for highways, reserves, recreational facilities and schools, or monetary payments in lieu of services or land. For example, s.50(5) of the Planning Act, S.O. 1983, c.1 authorizes the Minister to require the developer to convey land not exceeding five per cent of the area of the subdivision to the relevant municipality for park and other recreational purposes and to dedicate land for highways deemed necessary to the subdivision. The Minister can also require the developer to enter into an agreement whereby the developer undertakes to provide such other infrastructure or monetary payments as the Minister may deem necessary for the subdivision.[2]

Pursuant to s.95 of the Planning Act, R.S.A. 1980, c.P-9, the developer must provide, without compensation, land for public roadways, utilities, and environmental reserves and either land or money for municipal and school reserves. In addition, a subdivision approval officer can require the developer to construct or pay for the construction of a public roadway giving access to the subdivision, to install or pay for the installation of utilities necessary to the subdivision, and to construct or pay for the construction of off-street parking facilities.[3] The Municipal Act, R.S.B.C. 1979, c. 290 states that anyone wishing to subdivide property must provide land for public open space and roadways.[4] In addition, development projects are subject to the imposition of development cost charges, the purpose of which are to assist the municipality to pay for the capital cost of providing services and public open space for the direct, or indirect, benefit of the new development.[5]

In addition to these specific powers, some provincial planning legislation grants municipal planning authorities a discretion to impose such conditions as they deem "necessary" or "advisable".

The Planning Act, S.O. 1983, c.1 s.50(5) authorises the Minister to impose such conditions on the approval of a plan of subdivision as in his opinion are "reasonable." Pursuant to s. 50(5)(d), the Minister may require the developer to enter into an agreement dealing with such matters as he may consider necessary. Further, the Municipal Act, R.S.O. 1980, c.302, s.166 provides that the sums levied upon a subdivision of land may be placed in a consolidated fund which need not be used to defray the costs of that particular subdivision. In British Columbia, the Municipal Act grants municipal councils the discretion to impose development costs charges and to place these monies in a consolidated fund which may be used to finance general municipal costs.[6] In Alberta, municipalities may exact both a redevelopment and an off-site levy, but no legislative guidelines limit the amounts which may be exacted.[7]

B. Purpose And Effects Of Subdivision Exactions

Subdivision control, after zoning by-laws, is one of the oldest forms of land use regulation. However, the use of subdivision exactions to finance the provision of municipal services is relatively recent, since formerly municipalities themselves installed local services and recouped their costs by imposing local improvement taxes.[8] With the rapid growth of many communities in the 1960s and 1970s, this practice changed so that developers may now be required to finance or construct a variety of services ranging from roads and utilities to survey controls, monuments, traffic signals, street lighting, and landscaping.[9] In addition, some municipalities exact cash contributions for unspecified purposes and subsequently use those contributions to off-set the cost of regional services.[10]

Subdivision exactions have commonly been justified by the user-pay principle.[11] According to principles of public finance, the most efficient allocation of a community's resources is achieved if the cost of local services is distributed in proportion to the benefit each resident derives from those services.[12] Thus, if a new subdivision requires interior roads, sidewalks, and street lighting, its residents rather than the existing community should bear the full cost.[13] In accordance with this view, the developer acts as a conduit, passing on the initial cost of the subdivision exactions to the new residents in the form of higher housing prices.[14]

The principle that residents of new subdivisions should pay for the costs of services directly attributable to their needs has proven difficult to apply accurately in practice. In many cases, the decision to expand existing facilities or construct new ones results from a mixture of demands by the existing community, the immediate requirements of new residents, and the projected use of these facilities by future residents. In the past, the problems of dividing the cost of new facilities amongst these three groups has lead some municipalities to calculate subdivision levies on a per capita basis.[15] Potentially, such a practice could result in the undercharging of new residents and the subsidizing of these facilities by the older residents of the community.[16] Alternatively, some municipalities have adopted practices of charging off-site levies and requiring developers to oversize utilities.[17] Depending on whether such costs are averaged or calculated on a marginal basis, either the initial or subsequent developers are left with substantial interest and carrying charges.[18] To the extent that these costs as passed on to the consumer, the residents of these subdivisions may be faced with higher housing costs.[19]

Similar problems exist with respect to the practice of requiring developers to finance the construction or expansion of recreational facilities, libraries, and park acquisition. Here, the issue is again one of determining whether new residents should bear the total cost of supplying facilities used by the entire community. Frequently, the size of the existing population itself creates a sufficient demand for new facilities. The influx of new residents may simply increase the community's population to the point where the construction of new facilities becomes imperative. Even where the number of existing residents do not warrant new or expanded facilities, it is likely that some of these individuals will use these facilities once they have been constructed.[20] In both situations, the developer and the new residents will subsidize the recreational activities of the existing community.[21]

C. Judicial Response To Subdivision Exactions

The decisions of the Canadian courts and provincial planning boards discussed below show that Canadian municipalities have been able to impose a variety of conditions upon developers seeking subdivision approval. Municipalities have successfully imposed uniform, region-wide lot levies and have required developers to contribute to general reserve funds. They have also forced developers to dedicate land for public park purposes and road widenings and to build oversized utilities. While both the courts and provincial planning boards have developed tests requiring subdivision exactions to have some reasonable or rational connection to the needs of the subdivision, the decided cases demonstrate that these criteria are not applied rigorously.[21A] It appears that the Canadian courts and provincial planning boards will only invalidate conditions that bear absolutely no relationship to the needs of the subdivision.

1. Decisions of the Supreme Court of Canada

In its single decision on subdivision exactions, Beaver Valley Development Ltd. v. North York Township,[22] the Supreme Court of Canada liberally construed the Township's power to exact levies for sewerage facilities. Beaver Valley Development Ltd. had entered into an agreement with the Township to pay five dollars per foot frontage as a contribution towards the maintenance and expansion of the Glendale sewage disposal plant.[23] Prior to entering into the agreement, the Township had transferred the Glendale plant to Metropolitan Toronto, but had not informed Beaver Valley Development Ltd. of the fact.[24] Metropolitan Toronto made other arrangements for the treatment and disposal of sewage, with the result that the original facility no longer had to be expanded. The monies previously earmarked for that purpose were placed in a general reserve fund.[25] Subsequently, the Planning Act (Ont.), 1955, c.61 was amended so as to retrospectively validate the agreement between Beaver Valley Development Ltd. and the Township of North York.[26]

Beaver Valley Development Ltd. sued the Township, alleging that the agreement was void and unenforceable in so far as it dealt with the sewage levies.[27] Beaver Valley Development Ltd. was unsuccessful before both the Ontario District Court and the Court of Appeal.[28] Beaver Valley Development Ltd. then appealed to the Supreme Court of Canada, alleging, inter alia, that the Township had no statutory right to enter into the agreement, its actions were discriminatory and made in bad faith, it had coerced the company into making the agreement, and the levies were a form of indirect taxation.[29]

The Supreme Court of Canada found in favour of the Township, with the majority of the Court holding that the amendment to the Planning Act retrospectively validated the development agreement.[30] Mr. Justice Locke also held that the Township had the authority to impose sewerage levies on similar grounds to those given by the majority.[31] However, his Lordship addressed the substance of the arguments raised by Beaver Valley Development Ltd. In response to the company's argument the levies constituted an unauthorized form of taxation, his Lordship stated:[32]

> If it were necessary to deal with these contentions on the merits they should in my opinion, fail, quite apart from any consideration of the amendment to s.26 of the Planning Act ... The Glendale sewage disposal plant had been built by the respondent township and rates imposed upon other lands in the township which enjoyed the benefit of its use in order to pay for its construction and operation. At the time the appellant applied to the township for approval of its plans the township was under no obligation to permit the use of its sewage disposal plant by the appellant ... The sums stipulated in the agreement between the parties were simply contributions to be made towards the cost theretofore incurred by the township for the plant.

His Lordship had earlier noted that the company had connected its development to the Glendale plant and that the first residents had benefited from this sewage disposal system.[33]

The decision of Beaver Valley Development Ltd. v. North York Township[34] suggests that the Supreme Court of Canada, if faced with another case on subdivision exactions, would be lenient in its interpretation of a municipality's powers. The majority of the Court was untroubled by the company's allegations that the Township had imposed levies for one purpose but planned to use them for other unspecified purposes. Mr. Justice Locke, the only Justice to discuss this aspect of the case, held that the levies were justified as contributions towards the costs already incurred by the Township. His Lordship, like the other members of the Court, did not appear worried that the levies, which had been imposed to off-set the cost of maintenance and expansion of the plant, were to be placed in a consolidated fund and possibly used for purposes unrelated to the company's subdivision.

The effect of Beaver Valley Development Ltd. v. North York Township[35] has been limited somewhat by the restructuring of planning legislation so that guidelines are placed upon the discretion of the subdivision approving authority. In some provinces, subdivision approving authorities can only require the developer to construct utilities and roads that are necessary for the new subdivision.[36] Other provinces regulate the amount of land or money that subdivision approving authorities can request developers to provide as park, open space, or environmental reserve.[37] These provinces attempt to limit the amount by which a particular group of new residents can be forced to contribute to services benefiting the entire community.

Nevertheless, some provincial planning legislation still enables subdivision approving authorities to levy fees for services whose need is not directly attributable to the new subdivision.[38] Courts in these provinces have developed tests requiring the conditions or payments demanded by local planning authorities to have some rational or reasonable connection to the requirements of the new subdivision.

2. Decisions of the British Columbia Courts

Three early decisions from the British Columbia courts, Re Municipal Act, Re By-Law No.1655 of Surrey District,[39] Vantreight v. Saanich,[40] and Re Land Registry Act; Re Proposed Subdivision,[41] indicate that the conditions exacted by an approving officer in the province must have a rational connection to the demands created by the new subdivision. In Vantreight v. Saanich, the British Columbia Court of Appeal held that land exacted for the construction of roads must have a necessary and reasonable connection to the subdivision.[42] In Re Municipal Act, the developer was required to install a complete sewage disposal system. The relevant legislation only gave the approving officer the authority to demand the developer supply connections and sewer trunk lines.[43] The British Columbia Court of Appeal found that the Municipal Act did not provide the officer with the express authority to demand that the developer construct a complete sewage disposal facility.[44] In addition, the Court indicated that the requirement placed an onerous and inequitable financial burden on the residents of the new subdivision by forcing them to provide a general municipal service.[45] Finally, in Re Proposed Subdivision, the British Columbia Court of Appeal indicated that, in some situations, the courts would review the rationality of an approving officer's decision.[46] In that case, an approving officer had refused to grant subdivision approval because the subdivision might have posed problems for the completion of a regional road network at a later date.[47] The Court of Appeal, although reaffirming that it would not lightly interfere with the discretion of a municipal officer, felt that the mere probability of future development was not a sufficient basis upon which to refuse an application to subdivide one acre of farmland for residential purposes.[48]

More recent decisions of the British Columbia courts demonstrate that the judiciary in that Province have chosen to limit the situations in which they will review the rationality of conditions imposed by the approving officer. In Oak Bay Manor Ltd. v. Corporation of Delta,[49] the municipality required a developer to dedicate a part of the foreshore of the Fraser River as a public park.[50] The amount of land requested by the approving officer was less than the maximum of five percent, and evidence showed that the municipality had been concerned for some time about retaining the foreshore in its natural state.[51] Oak Bay Manor refused to dedicate the required land, so the approving officer refused their application for subdivision approval.[52] Oak Bay Manor appealed this decision to the British Columbia Supreme Court.[53]

In upholding the approving officer's decision, the British Columbia Supreme Court adopted the test for reviewing planning decisions found in the Supreme Court of Canada decision of City of Vancouver v. Simpson,[54] namely that the courts should review the conditions imposed by approving officers if they have no statutory basis, display bad faith, are discriminatory, or unreasonable.[55] However, the Court stated that it would strike down subdivisions conditions on the grounds of reasonableness only when their terms had no factual basis whatsoever[56] and bore no rational connection to the needs of the subdivision.[57] On the facts, the British Columbia Supreme Court found that the conditions requested by the approving officer were reasonable since evidence showed that the municipality had been concerned for some time about the effects of further development on the foreshore.[58]

The decision of Re Ball[59] provides further proof that the British Columbia courts have adopted a policy of judicial deference towards the powers of approving officers to impose conditions upon the subdivision and development of land. Re Ball concerned the refusal of an approving officer to grant subdivision approval pursuant to s.96 of the Land Registry Act, R.S.B.C. 1979, c.219. This section endows the approving officer with the discretion to refuse an application for subdivision approval on the basis that it would "injuriously affect the established amenities of adjacent properties" or offend the "public interest". In this case, two sets of couples had applied for approval to subdivide two sets of city lots. One couple's application was granted, while the other couple's was refused. Both sets of lots were of a similar size and were located in the lower section of the same street.[60]

The Balls, the couple whose application had been denied, appealed the approving officer's decision to the British Columbia Supreme Court.[61]

The British Columbia Supreme Court upheld the decision of the approving officer, stating that the courts would review planning decisions on three grounds: lack of express or implied statutory authority, bad faith and discrimination, and unreasonableness in the sense that the decision was specious and lacked an adequate factual basis.[62] The Court found that there was no evidence to substantiate an allegation of bad faith,[63] and that the differences in neighbourhood characteristics and traffic patterns justified the different treatment of the two lots.[64] The Court further held that an adequate factual basis for the decision existed because the municipality could point to planning reports stressing the amenity value of the street.[65] In conclusion, the British Columbia Supreme Court reiterated that it would defer to the judgement of the approving officer in all but the most capricious and arbitrary cases.[66]

Dyck v. Stinson[67] illustrates one situation in which the British Columbia courts may find a condition unreasonable. In Dyck v. Stinson, the plaintiffs had sought approval for the subdivision of a twenty-acre parcel of land into two, ten-acre lots, both of which were to be used as farms.[68] As a condition of approval, the local planning official requested the dedication of a sixty-six foot wide strip of land for use as a road allowance.[69] Both parcels of land, as well as the properties of the adjacent landowners, had access to the main highway or to the local public road.[70] No land had been requested from the other owners.[71]

The British Columbia Supreme Court held that neither ss.711(1) and 713(1) of the Municipal Act nor s. 86(1) of the Land Title Act, R.S.B.C. 1979, c.219 provided the local planning authorities with the power to require that persons seeking subdivision approval dedicate land for road allowances in these circumstances.[72] The Court stated that ss. 711(1) and 713(1) of the Municipal Act allowed planning authorities to request land for road allowances only when internal roads were needed in the subdivision, while s.86(a) of the Land Registry Act gave them the power to request land for road allowances that were reasonable and necessary.[73] Following Vantreight v. Saanich,[74] the Court held that "reasonable and necessary" meant that a rational connection must exist between the condition or levy imposed and the needs of the subdivision.[75] In the Court's opinion, there was no rational connection between the road allowances requested by the planning official and the needs of the subdivision because the plaintiffs intended to create two smaller farms from the larger parcel. Further, intensive residential development was unlikely as all the land in the community fell within an agricultural reserve.[76]

The British Columbia courts have indicated that they will review conditions and levies imposed by approving officers on certain limited grounds: lack of statutory basis, bad faith, discrimination, and unreasonableness.[77] In practice, few courts have quashed decisions of approving officers on the fourth ground, holding that a condition is reasonable and necessary if it is rationally connected to the needs of the subdivision. The recent decisions of Oak Bay Manor Ltd. v. Corporation of Delta[78] and Re Ball[79] show that the British Columbia courts will defer to the approving officer whenever his decision is supported by some sound planning rationale. A decision of an approving officer must be arbitrary and capricious before it will be quashed by the judiciary.

3. Decisions of the Ontario Courts and Municipal Planning Board

The Ontario courts and the Ontario Municipal Board have developed a substantial jurisprudence that limits the ability of municipalities to shift financial responsibility for the provision of some public services onto private developers. The two leading court decisions, Re Mills and Land Division Committee of York[80] and Re Pinetree Development Co. Ltd. and Minister of Housing of the Province of Ontario,[81] establish that subdivision exactions must "fairly and reasonably relate" to the proposed development. The Ontario Municipal Board, in Re Steel Co. of Canada and City of Nanticoke,[82] has held that subdivision exactions may not be used to solve general municipal servicing requirements. Within these parameters, subsequent decisions of the Board demonstrate that local governments may exercise a wide discretion when imposing conditions for subdivision approval. A recent Board decision, Re George Wimpey Canada Ltd. and Regional Municipality of Durham,[83] indicates that sums levied pursuant to s.50(5) of the Planning Act, S.O. 1983, c.1 need not be directly attributable to the needs of the subdivision, but may reflect concerns with long-term regional requirements.

In Re Mills and Land Division Committee of York ("Re Mills"), the Land Division Committee had imposed a severance fee pursuant to section 33(5) of the Planning Act S.O. 1970 (now s.50(5) S.O. 1983, c.1).[84] The developer challenged the imposition of the fee, alleging that the Committee did not have the authority to levy this kind of fee as a condition of subdivision approval.[85] The Ontario Divisional Court upheld the Land Division Committee's right to impose a severance fee despite the lack of specific statutory authority.[86] The Court cited three examples of situations where the Committee might be deemed to have acted beyond its jurisdiction: if the Committee imposed a condition that was manifestly unrelated to the consequences flowing from the severance of land; if the terms imposed by the Committee reflected the influence of extraneous considerations; and if the Committee acted when the essential preconditions of its jurisdiction were absent.[87] Other Ontario courts and the Ontario Municipal Board have interpreted the decision of Re Mills as holding that subdivision conditions and levies must "fairly and reasonably" relate to the consequences of severance.[88]

In Pinetree Development Co. Ltd. and the Minister of Housing of the Province of Ontario, the Regional Municipality of Durham attempted to exact levies for external services pursuant to s.24(2) of the Condominium Act, R.S.O. 1970, c.77.[89] Section 24(2) gives the municipal and regional planning authorities the power to impose similar conditions and levies upon applications to register condominium schemes similar to those they impose on applications for subdivision approval.

Pinetree had originally applied for subdivision approval from the then-existing Township of Pickering, the predecessor of the Regional Municipality of Durham.[90] The Township and Pinetree had entered into a development agreement whereby Pinetree agreed to provide or to pay for a variety of internal services, while the Township assumed responsibility for the provisions of services such as roads, water treatment facilities, storm drains, and sewers.[91] Pinetree fulfilled its part of the agreement, and sold virtually all the lots in its subdivision.[92] Subsequently, it sought to change the subdivision plan to a condominium.[93] In the interim, the Township of Pickering had been succeeded by the Regional Municipality of Durham, which attempted to impose levies to cover the provision and expansion of the external services formerly the responsibility of its predecessor.[94] It was common ground that the transformation from subdivision to condominium did not generate a need for additional services beyond the provision of separate water meters.[95]

Pinetree applied to the Ontario Divisional Court for an order that the Regional Municipality of Durham was not lawfully entitled to exact the levies.[96]

The Court found that Pinetree was not required to pay the levies proposed by the Regional Municipality of Durham.[97] The Court reaffirmed its earlier reasoning in Re Mills, stating that the conditions imposed by the Regional Municipality of Durham had to be rationally related to the demands for increased services created by the subdivision of land or the registration of a condominium scheme.[98] Pinetree's condominium project had not generated an additional demand for water and sewage lines or wider roads.[99] Consequently, the Court found that there was no relationship between the consequences of the legal division of land by way of condominium ownership and the sums demanded by the Regional Municipality.[100]

An important aspect of the Court's decision was its concern with the possible inequities resulting from the Regional Municipality's use of its powers under the Condominium Act. Had the municipality been successful in its claim, the development company and the condominium owners would have been required to pay an additional sum of money which would have been placed in a consolidated fund for general municipal use.[101] In addition, these sums would have been assessed at a higher rate than that current at the time of the original application for subdivision approval.[102]

The most recent judicial decision discussing the validity of subdivision levies is Hay et.al. v. The Corporation of the City of Burlington.[103] The City of Burlington had imposed a levy of approximately $15,000 as a condition of subdivision approval.[104] Prior to Hay's application, the land had been under a holding designation. During this time, the City had expropriated part of the property for a road widening, which, in turn, had provided a reason for lifting the holding designation.[105] The money paid upon the expropriation of the land for a road widening was equal to the amount the City levied as a condition of subdivision approval.[106] Apparently, the City had adopted a practice of recouping sums paid upon the expropriation of land from persons seeking subdivision approval for nearby developments.[107]

The plaintiffs applied for an order stating that the City had no authority to impose the levy. The Divisional Court upheld the City's position, and the plaintiffs then appealed to the Ontario Court of Appeal.[108]

The Ontario Court of Appeal set aside the order of the Divisional Court, declared the City's actions ultra vires, and ordered the City to repay the levies.[109] The

Court found that the condition imposed by the City was irrelevant to the consequences of subdivision because the land had been expropriated and the road widened before the application for rezoning and subdivision approval had been made.[110] Like the levies imposed in Re Pinetree Development Co. Ltd.,[111] those imposed in Hay v. City of Burlington bore no relation to the actual demands created by the increased population.

The Ontario Municipal Board in Re Steel Co. of Canada Ltd. and the City of Nanticoke[112] apparently limited the extent to which a municipality could exact monies from specific developers to pay for general municipal services used and enjoyed by the entire community. The City of Nanticoke had imposed the following conditions upon the subdivision of land for industrial park: the conveyance of five percent of the total area for park purposes; the designation of one block of land as open space; and the payment of a sum of money to off-set the cost of providing certain services.[113] Evidence showed that the City had imposed the last condition, in part, to defray the costs of "soft services" such as new municipal buildings and a better transportation system.[114] There had been no attempt to link the need for improved municipal services to the subdivision; money to cover these services was exacted on the basis of a projected increase in the municipality's total population.[115] The

Ontario Municipal Board did not consider that a levy based on a hypothetical population increase was sufficiently related to the consequences of the particular subdivision and held that the City could not impose a monetary levy for "soft services".[116]

In the decision of Frey and Regional Municipality of Peel Land Division Committee ("the Frey case"), the Ontario Municipal Board refused an application to impose a monetary levy for park purposes as a condition of consenting to the conveyance of land pursuant to a scheme of subdivision.[117] The Regional Municipality of Peel sought to exact a levy for park purposes from Frey when he conveyed part of his holdings to a third party for purposes of eventual subdivision.[118] This levy was imposed on all new subdivisions in the immediate area as part of a regional municipal planning policy, with no consideration given to the specific needs of each development.[119] Evidence tendered at the hearing suggested that immediate area did not require a neighbourhood park,[120] but that the entire community, in fact, needed a major park.[121] The Regional Municipality of Peel could not demonstrate the extent to which the new lots created by Frey's conveyance increased the demand for the latter kind of park.[122]

The Ontario Municipal Board chose not to impose a levy for park purposes, stating that the Regional Municipality had not established that the severance of land created a need for either a neighbourhood or regional park.[123] In rejecting the Regional Municipality's claim that a levy should be imposed, the Board held that the municipality must demonstrate that the levy was equitable, reasonable, and relevant.[124] With respect to the equitableness of a levy based on municipal policy, the Board stated:[125]

> It is not enough to argue that the Board should impose the levy requested because council has passed a resolution and adopted a policy that all new residential lots should be charged such amount. Circumstances may vary from one case to another. Each case must be decided on its merits in light of the evidence adduced before the taxing authority, in this case the Board.
>
> Nor is it enough to say that it is equitable because the levy requested is the same as that charged to other new residential lots. That is too narrow a view. The question of equity involves existing residential properties as well as new housing to avoid the possibility that the special levies may subsidize existing residential properties.

The Board indicated that, in the future, it would require a municipality to provide evidence of the following matters before it would consent to a levy for general municipal works: the nature and location of the works; the estimated cost; the projected starting date of construction; the extent to which the need for the works is caused by the existing population; and the amount of money already accumulated for the works.[126]

The restrictions that the Frey case placed upon Ontario municipalities have been modified by two subsequent Board decisions. In the first of these decisions, Emitt Developments v. City of Brampton ("Emitt Developments"), the Board stated that it preferred not to follow the Frey case because it did not provide municipal governments with sufficient flexibility to plan long-term financing for major capital expenditure on services.[127] In the second of these decisions, Re George Wimpey Canada Ltd. and Regional Municipality of Durham, the Board stated that the evidential test established in the Frey case should not bind future Boards.[128] The Board further stated that a levy need only be "proper and reasonable" and did not have to be directly attributable to the needs of the new subdivision.[129]

In Emitt Developments, the Ontario Municipal Board considered whether s.50(5) of the Ontario Planning Act gave planning authorities the ability to impose levies based on the average per capita cost of local capital works projects.[130] In this particular case, the Regional Municipality of Peel claimed a levy of $1,958 per unit, while the City of Brampton claimed a levy of approximately $2,660 per unit.[131] The Board reviewed recent decisions concerning levies and concluded that the legislation did permit this type of condition to be exacted.[132] In arriving at this conclusion, the Board expressed concern that the requirement that levies be directly related to the needs of the particular subdivision would destroy current municipal financing schemes which relied upon the fees to raise capital.[133] It also addressed the issue that a levy based upon the per capita cost of municipal services would inaccurately reflect the extent to which a particular subdivision contributed to the demand for municipal services. The Board stated:[134]

> It is probably trite to say that any residential development such as this will cause an increase in population with the resulting necessity for increased municipal services with perhaps an increase in the level of services as well which will require or have required capital financing in the form of debentures by the municipality. It is our opinion that to the extent that people cause the need for the services that levies based on an average per capita cost of capital projects can be construed as being relevant to the proposed development.

Despite the wide scope of this statement, the Board awarded a levy in an amount less than a third of what had been requested by the City of Brampton.[135] The Board's reasoning appeared to have been based upon the location of the new development to the centre core of the City of Brampton, which had already been provided with major municipal services.[136] The Regional Municipality of Peel was awarded the full amount of its proposed levy because it was in the process of constructing services which would benefit the new subdivision.[137]

In Re George Wimpey Canada Ltd. and Regional Municipality of Durham, ("Re George Wimpey Canada Ltd."),[138] the Board again discussed the themes raised in Emmitt Developments.[139] George Wimpey Canada Ltd., the petitioner, questioned the validity of Clause 2 of the standard development agreement of the Regional Municipality of Durham. This condition read:[140]

> That the owner agrees in writing to satisfy all the requirements, financial or otherwise, of the Regional Municipality of Durham concerning the provision of roads, installation of services and drainage.

Pursuant to Clause 2, George Wimpey Canada Ltd. was required to pay cash levies for sanitary, sewer, and water systems and regional roads. The Regional Municipality of Durham imposed this levy on all developments falling within its jurisdiction.[141] The sums levied for the water and sewer system were integrated into a regional financing scheme whereby the money collected was expended on raising funds to finance debentures for the construction and maintenance of these facilities.[142] The sums levied for the roads were based upon the cost of construction and estimated on the number of lots projected to be developed during the ensuing decade.[143]

The Ontario Municipal Board, after a lengthy analysis of the fiscal effects of the proposed levies, held that the

Regional Municipality of Durham could validly impose levies on a region-wide basis.[144] However, the Board found that, on the evidence, the levies imposed for waste disposal and external highways could not be jusitifed.[145] In the Board's opinion, there was no evidence to support the Regional Municipality's claim that the waste disposal levy was attributable to the proposed subdivision or any future regional growth in population.[146] And while the Board was prepared to concede that the amount sought as a road levy was reasonable, it held that s.36(4) of the Planning Act, dealing with levies for external highways, required more detailed evidence than that provided by the Regional Municipality.[147]

An important aspect of the Board's decision that the Regional Municipality could impose a region-wide levy was its discussion of the general tests for the validity of subdivision conditions and levies. The Board concluded that Re Mills[148] established the definitive criteria for determining the validity of subdivision conditions and levies.[149] On the Board's reading of the case, the sole reasons for which a court or board could overturn a levy were first, if the condition were irrelevant or extraneous to sound planning precepts, second, if the planning authority had acted outside its express statutory jurisdiction, and third, if the condition was such that no reasonable planning authority would have imposed it.[150] The Board further held that the criteria in Re Mills could be satisfied by levies that were "proper and reasonable" rather than those "directly attributable" to the development in question.[151] The Board indicated that the reasonableness of a subdivision condition or levy should be assessed in light of the proposition that a subdivision "by its very nature" creates a demand for expanded municipal services.[152] In the Board's opinion, municipalities seeking to impose levies did not necessarily have to meet the evidentiary test established by the Frey case. Rather, it was sufficient that municipalities prove that the size and purpose of the levies could be attributed to the demand for additional services created by the subdivision.[153]

A second issue that arose was whether the proposed levy was equitable, particularly when the subdivision did not generate the immediate need for additional services. The Board stated that financial responsibility for municipal services should be shared equitably between existing and future residents.[154] In the Board's opinion, the Regional Municipality should not protect existing residents from contributing to the costs of services of benefit to them by shifting responsibility to the developer and new residents.[155] At the same time, new residents could not expect to use the capacity of existing facilities without assuming financial responsibility for that use.[156] In general, the Board held that all levies must be fair, equitable, and democratic.[157]

According to the Board, the Regional Municipality's levy fulfilled these criteria because it distributed the benefit of regional services and the accompanying financial responsibility as equitably as possible throughout the community.[158] The Regional Municipality had imposed the levy to finance the construction and maintenance of "hard services" required by all areas of the regional municipality.[159] By imposing a region-wide levy, the Regional Municipality ensured that all subdivisions, regardless of their proximity to urban centres and discrepancies in their tax bases, would eventually be provided with services of a similar quality.[160] While new residents, under the financing scheme, would shoulder the full costs of the services over an initial ten-year period, financial responsibility would gradually shift to the municipality so that over a twenty-year period the amount paid by the new residents would represent half of the total cost.[161]

The Board's decision is summarized in the following quotation:[162]

> We agree that the specific connections required to put Wimpey into the system are modest, and indeed the evidence is that a new treatment plant would not be required for the population to be developed in the Wimpey subdivision. Similarly we

> agree on the evidence that the volumes of traffic associated with the Wimpey subdivision are relatively insignificant and can probably be absorbed into the existing traffic scheme without affecting current operations. In the first case however, the Wimpey population, and that of the following developments, will use available capacity which will eventually necessitate additional treatment facilities. Similarly incrementally, Wimpey will use road capacity and ultimately in the over-all system, some subdivision which plugs in and will be required, in the Wimpey proposal, to provide the extra facility. We adopt the region's argument that:
>
> > To adopt and implement a development policy that ensures that new residents who enjoy the same Regional Services without regard to their geographical location, must pay widely different lot levies based entirely upon their proximity to sewage treatment plant, water supply plant, or trunk sewer, substitutes accident for equity. Such a policy simply provides an economic bonus to some and a corresponding cost to others.

4. Decisions of the Alberta Court of Appeal and Planning Board

In Alberta, the Alberta Planning Board and the Alberta Court of Appeal have recently discussed the extent to which local planning authorities in that Province can force developers to provide or contribute towards the cost of oversized utilities. Although the legislation discussed in these cases differs from the Ontario legislation, the Alberta Planning Board and the Alberta Court of Appeal have adopted a very similar position to the Ontario courts and Ontario Municipal Board. In principle, and provided that the municipality has acted within its statutory authority, a developer can be required to install oversized utilities or contribute towards the cost of such facilities.

In Thiessen Cattle Ltd. v. Alberta Planning Board,[163] the issue was whether s.92 of the Planning Act, R.S.A. 1980, c.P-9 enabled a planning commission to stipulate, as a condition of subdivision approval, that the applicant pay a proportionate amount of the cost of utilities installed earlier when adjoining land was subdivided. The Alberta Court of Appeal held that while it was reasonable for a developer to pay for the installation of services on adjoining land when those services benefited his land,[164] s.92 did not provide the necessary authority for such a practice.[165]

Between 1972 and 1977 services were installed pursuant to a subdivision on lands adjacent to the property owned by Thiessen.[166] In 1984, Thiessen made an application for subdivision approval. The City of Lethbridge approved the application, subject to the condition that Thiessen pay a proportionate share of the cost of the services installed previously.[167]

The City imposed the subdivision condition pursuant to s.92(1)(b)(iii) of the Planning Act. Section 92(1)(b)(iii) states:

> 92(1) A subdivision approving authority may impose the following conditions or any other conditions permitted to be imposed by the subdivision regulations on a subdivision approval issued by it:
>
> ...
>
> (b) at the request of a council, a condition that the applicant enter into an agreement with the council respecting all or any of the following:
>
> ...
>
> (iii) to install or pay for the installation of utilities that are necessary to serve the subdivision (emphasis added).

Other powers available to the City were contained in s.77.1 of the Planning Act, which provides:

> 77.1 (1) An agreement under section 76, 77 or 92 may require that the applicant for a development permit or subdivision approval shall pay for all or a portion of an improvement in excess of the requirement for the proposed development or subdivision.
>
> (2) An agreement requiring payment in accordance with subsection (1) may also provide for the reimbursement of the excess cost paid in accordance with that agreement.
>
> (3) If a municipality has entered into an agreement providing for reimbursement in accordance with subsection (2), the municipality shall, at such time as other land that is benefited by the improvement is developed or subdivided, as the case may be, enter into agreements with applicants for development permits or subdivision approval for that land requiring those applicants to contribute a proportionate share of the cost of the improvement.

(4) An agreement under subsection (3) may include an allowance for interest charges accumulating from the time that the payment was made under subsection (1) until the contribution is made under subsection (3).

(5) In this section, 'improvement' means

(a) a facility or land referred to in section 76(2) or

(b) a roadway, walkway, utility or facility referred to in section 77(1) or 92(1).

Alternatively, the City could have used its powers under the Municipal Taxation Act, R.S.A. 1980, c.M-31 to authorize the construction of local improvements and charge a proportionate part of the cost to adjoining property owners.

The Municipal Planning Commission approved the City's decision that Thiessen's subdivision approval be subject to the condition that it agree to pay for the previously installed utilities. Thiessen appealed this decision to the Alberta Planning Board, and the Board dismissed the appeal.[168] Thiessen then appealed to the Alberta Court of Appeal.

The Court of Appeal held that s.92(1)(b)(iii) did not authorize the City's action, but only permitted it to impose conditions requiring Thiessen to construct or pay for work necessary at the time of the subdivision application.[169] However, the Court stated that it did not dispute the reasonableness of requiring adjacent property owners to pay for services installed on other properties which were of benefit to them.[170] It is likely, therefore, that Thiessen would have been unsuccessful in its challenge if the City had used its powers under s.77.1 of the Planning Act or its powers under the Municipal Taxation Act.

In an earlier decision, In The Matter of the Planning Act,[171] the Alberta Planning Board upheld the decision of the Edmonton Municipal Planning Commission requiring a developer to contribute a proportionate amount towards the cost of storm water trunk lines within a drainage basin. The Planning Board found that the City of Edmonton's system of distributing oversizing costs between the initial and subsequent developers was authorized by the Planning Act, notwithstanding that the system had been implemented prior to the enactment of s.77.1 of the Act.[172] The Planning Board also discussed the equitableness of the City's system of cost-sharing, and concluded the developers could be required to pay a proportionate share of utilities and services even though these utilities and services benefitted other subdivisions.[173]

The City of Edmonton's cost- sharing system had been implemented in the 1970s, prior to the enactment of s.77.1 in 1984. Consequently, statutory authority for the system lay in ss.76, 77 and 92 of the Planning Act, R.S.A. 1980, c.P-9, or the equivalent sections of the previous 1963 Act.[174]

The cost-sharing system devised by the City of Edmonton required private developers to finance and install storm trunk facilities in drainage basins where their subdivisions were located. The initial developer within the drainage basin was required to install on-site and off-site storm water facilities with sufficient capacity to serve his own subdivision as well as to allow the future connection of trunks lines serving part or all of the rest of the basin. His construction costs were then compared to his proportionate share of estimated costs for the drainage basin, known as the Permanent Area Contribution ("PAC"). If the developer's construction costs were greater than the PAC, then subsequent developers would have to reimburse him a proportionate share of those costs plus interest calculated from the date that construction of the facilities was completed.[175] Subsequent developers were also required to install new trunk lines with extra capacity to facilitate the connection of lines servicing future development in the drainage basin.[176] Again, their construction costs were compared to an updated PAC contribution, and would be reimbursed when subsequent development occurred.[177] The City acted as a "collection agency", distributing the PAC payments to prior developers as they were received.[178]

As a result of the cost-sharing scheme, the first developer's direct costs included four major components: the costs of facilities benefitting his own lands; front-ending costs for the oversizing of trunk lines; contributions to the drainage basin's trust account; and carrying charges on the oversizing costs until they were recovered.[179] The costs of subsequent developers were similar and, additionally, included a proportionate share of the outstanding oversizing costs of the first developer, a proportionate share of the outstanding carrying costs, and carrying charges on the shared costs.[180] The Planning Board found that the overall effect of the City's cost-sharing system was to transfer the majority of the outstanding unrecovered costs from the initial to the subsequent developer, and to make the latter the major financier of the oversizing components for the drainage basin.[181]

In the specific case before the Planning Board a number of residential servicing agreements covered two drainage basins where the developer's subdivision lay. These agreements had been signed some time prior to the developer's subdivision application. While the construction requirements of these agreements were redundant, the reimbursement provisions were still extant.[182] Under these agreements, the City was obligated to attempt to recover outstanding excess costs from future developers. The City's actual practice of recovering costs and assessing accrued interest differed from the precise terms of these agreements.[183]

While the developer raised a number of arguments against the validity of the City's actions, the ones relevant to this discussion were as follows: the oversizing of trunk lines and the sharing of the associated costs could not be considered as necessary to the subdivision;[184] s.77.1 could not be applied retrospectively to validate previous residential servicing agreements;[185] and the impact of the cost-sharing scheme on developers was inequitable and slowed development of residential land.[186]

With respect to the first argument, the developer submitted that s.92(1)(b)(iii) of the Planning Act only provided the City with the authority to levy costs that were necessary to provide storm services directly to the developer's subdivision.[187] This argument was rejected by the Planning Board, which stated that the developer's interpretation of s.91(1)(b)(iii) was too narrow and ignored the natural interdependence of lands within the drainage basin.[188] The Planning Board stated that this interdependence justified the creation of an overall storm drainage scheme to service the entire area, and that, as a consequence, utilities "necessary" to serve the subdivision included an equitable proportion of the total installation costs.[189] Further, the Board held that even where it was possible to separate the relative costs and benefits of one section of a drainage basin from another, the use of an overall storm drainage system justified the developer paying an equitable portion of the total cost of installation.[190]

In his second main submission, the developer argued that the agreement requiring him to pay a proportionate share of the previous developers' costs was not authorized by s.77.1 of the Planning Act. Such payments could be required only if the City had entered into agreements with previous developers which provided for reimbursement of excess costs "in accordance with" an agreement under s.77.1(1). The developer argued that an agreement was only in accordance with s.77.1(1) if it was made under that Section, which argument required s.77.1 to have retrospective application.[191]

The Planning Board also dismissed the developer's second argument. The Planning Board found the wording of s.77.1 provided authority for both the proposed cost-sharing agreement with the developer and the prior agreements containing the outstanding reimbursement clauses.[192] The Board held the prior agreements were agreements "in accordance with" s.77.1(1) and (2) because they were "like" or "similar to" agreements contemplated by those sections.[193]

In making its third argument, the developer submitted the City's cost-sharing system prevented further development in existing drainage basins. The developer suggested that as a result of accruing interest the average cost of servicing lands in existing drainage basins would gradually exceed the cost of installing new services in other drainage basins. The developer argued that development in existing drainage basins would become less competitive and gradually stagnate, thus causing an adverse effect upon the total costs of services, land values, and the marketability of lots in the City.[194] The developer used the possibility of stagnating development to support its contention that it should only have to pay for services directly benefiting its subdivision.[195]

The City, along with other major development companies, argued that the cost-sharing scheme was, in the long-term, less expensive and more efficient than providing separate services for each developer's land. The City and the other companies also argued that any change in the cost-sharing scheme would severely disadvantage previous developers who were already locked into the system and would affect the recovery of costs in all drainage basins.[196]

The Board, in response to these developments, noted that it did not have the authority to alter the impact of the cost-sharing scheme, and expressly stated that it reached no conclusions on the respective submissions of the parties.[197]

It is clear from these two decisions that both the Alberta Court of Appeal and the Alberta Planning Board have adopted a very broad view of the municipal power to impose subdivision conditions. In Alberta, a local planning authority can require developers to pay for a proportion of the costs of previously-installed services or install oversized utilities for eventual use by future subdivisions. The Alberta Court of Appeal has stated that these requirements are reasonable,[198] while the Alberta Planning Board has indicated that they are justified by the interdependence of separate developments within the community.[199] Both views are similar to that of the Ontario Municipal Board in Re George Wimpey Ltd.,[200] where that Board held that lot levies did not have to be directly attributable to the needs of a particular subdivision and recognised the need to distribute the costs of major services and utilities amongst existing and future residents of the community.

While these decisions are important because they do recognise the interdependence of development, they do not give equal weight to the developer's argument that some exactions have onerous and inequitable effects on particular subdivisions. For example, the City of Edmonton's cost-sharing scheme can place enormous financial burdens on the developer responsible for constructing and financing the oversized utilities. Although the developer is entitled to be reimbursed for many of these costs, reimbursement may not occur for a considerable time. In the interim, the developer must assume substantial carrying charges. To the extent that he can transmit such costs, incoming residents will face higher housing costs. If, as a result of a municipal policy of requiring the oversizing of utilities, development is redirected to another area of the community, the developer may suffer a substantial loss and incoming residents may find that they have paid more for housing in that subdivision than for housing in another area.

D. Conclusion

As the cases discussed above indicate, the Canadian courts have favoured a policy of judicial deference when reviewing the validity of subdivision exactions. This policy perhaps stems from the judiciary's perception that a local planning authority is in a better position than the courts to assess the innumerable effects created by the subdivision of land. Should a court choose to undertake a close analysis of the relationship between the consequences of a given subdivision and the terms of the proposed exaction, it would effectively assume the role of a planning board. This, the courts have specifically declined to do. Instead, the courts have chosen to review the validity of subdivision exactions on the traditional grounds of bad faith, discrimination, lack of statutory basis, and reasonableness.[201] The courts have stated that they will only strike down subdivision exactions on the latter ground when these exactions have no adequate factual basis and bear no rational connection to the consequences of subdivision.[202]

Even the Ontario Municipal Board, whose function is to scrutinize the merits of a planning authority's decision, has recently shown that it will disallow relatively few subdivision exactions. Previously, in Frey and Regional Municipality of Peel Land Division Committee, the Board had stated that it would not sanction region-wide, per capita levies simply because it was municipal policy to impose such levies on all new subdivisions.[203] The Board had also indicated that it would require detailed evidence linking the consequences of subdivision and the works proposed before it would approve region-wide levies.[204] However, after Re George Wimpey Canada Ltd., it seems that the Board will be satisfied if the planning authority establishes that the proposed subdivision exactions are "properly and reasonably" attributable to the consequences of subdivision.[205] Moreover, the Board will assess subdivision exactions in light of the fact that every subdivision "by its very nature" creates additional demand for services and facilities.[206] As demonstrated by the decision of Re George Wimpey Canada Ltd. itself, the Board's new policy allows planning authorities great flexibility when structuring their subdivision policies.

Recent decisions indicate that the Alberta courts and administrative planning agencies have adopted a position similar to that of their Ontario counterparts. Both the Alberta Court of Appeal and the Alberta Planning Board have indicated that developers can be made to pay for previously-installed services which benefit lands other than their own.[207] The Alberta Planning Board has also stated that developers can be forced to provide facilities designed to service subsequent developments.[208] Further, the Alberta Planning Board has indicated that it would not assess the general impact of complex cost-sharing systems if they were otherwise authorized by the enabling legislation.[209]

Despite this flexibility, regional and local planning authorities do not have an unrestricted ability to levy subdivision exactions. The British Columbia and Ontario courts have struck down conditions which have required developers and new residents to provide general municipal services,[210] as well as conditions which are totally unrelated to the effects of a proposed subdivision.[211] Similarly, the Ontario Municipal Board has held that a municipality cannot force developers and new residents to pay for services benefiting the entire community.[212] It has also stated that planning authorities cannot use subdivision exactions to solve general municipal financial problems.[213] Finally, the Board has begun to assess the general equitableness of subdivision exactions, stating that neither present nor future residents should have to assume a disproportionate share of the financial responsibility for municipal services.[214]

ENDNOTES

1 Legislation in British Columbia operates in a similar manner. Registration is a prerequisite to being able to transfer title to land and is conditional upon the approval of the subdivision approving officer. The officer may refuse an application if the subdivision does not comply with the provisions of the Municipal Act and the regulations and by-laws enacted thereunder. Land Registry Act, R.S.B.C. 1979, c.219, s.87.

2 Planning Act, S.O. 1983, c.1, s.50(5)(d).

3 Planning Act, R.S.A. 1980, c.P-9, s.95(a)(b)(c).

4 Municipal Act, R.S.B.C. 1979, c.290, s.729(1).

5 *Id*., s.719(1).

6 *Id*., ss.71(1), 719(1).

7 Planning Act, R.S.A. 1980, c.P-9, ss.92(1)b, 75(1).

8 Albert Hudec, "Municipal Exactions and the Subdivision Approval Process" (1980) 38 *U. of T. Fac. L. Rev.* 106 at 111; Alberta Advisory Committee on Development Charges and Off-Site Levies, *Report* (1986) 75.

9 Advisory Committee on Development Charges and Off-Site Levies, *Report*, *supra* n.8 at 35-39.

10 Brian D. Bucknall, "In Search of the Equitable Levy: New Approaches to the Imposition of Conditions upon Development in Ontario" 11 (1980) M.P.L.R., 133; Hudec, "Municipal Exactions and the Subdivision Approval Process," *supra* n.8 at 110.

11 Robert C. Ellickson, "Suburban Growth Controls: An Economic and Legal Analysis" (1977) 86 *Yale L.J.* 385; I.M. Heyman and T.K. Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Subdivision Residents Through Subdivision Exactions" (1964) 73 *Yale L.* 1119; John D. Johnstone, Jr., "Constitutionality of Subdivision Control Exactions: The Quest for a Rationale," (1966-67) 52 *Cornell L.Q.* 871; Hudec, "Municipal Exactions" and the Subdivision Approval Process," *supra* n.8 at 106-111.

12 Hudec, "Municipal Exactions and the Subdivision Approval Process," supra n.8 at 111.

13 Id.

14 At present, there is some controversy as to whether development cost charges are passed onto the purchaser of new housing. Hudec, "Municipal Exactions and the Subdivision Approval Process," supra n.8 at 114-116, argues that charges are not necessarily passed onto the consumer because:

1. the developer does not occupy a monopoly position; and
2. demand for new housing is relatively price elastic because existing housing acts as a substitute.

Hudec also suggests that developers do not absorb these costs but pass them on to landholders at the urban/rural fringe in the form of lower land prices. It should be noted that the Supreme Court of Canada, in David v. Ville de Jacques-Cartier [1959] S.C.R. 797 at 799-80 adopted the view that development charges were passed on to the consumer.

15 Hudec, "Municipal Exactions and the Subdivision Approval Process", supra n.8 at 110.

16 Hudec, "Municipal Exactions and the Subdivision Approval Process," supra n.8 at 112.

17 Advisory Committee on Development Charges and Off-Site Levies, Report, supra n.8 at 13-22.

18 Advisory Committee on Development Charges and Off-Site Levies, Report, supra n.8 at 15.

19 See supra n.14 and discussion therein.

20 Hudec, "Municipal Exactions and the Subdivision Approval Process", supra n.8 at 127.

21 Advisory Committee on Development Charges and Off-Site Levies, Report, supra n.8 at 29-31.

21A For example, Oak Bay Manor Ltd. v. Corporation of Delta (1981) 15 M.F.L.R. 40 (B.C.S.C.) discussed infra n. 49ff; Re George Wimpey Ltd. and Regional Municipality of Durham (1983) 15 O.M.B.R. 75 discussed infra n. 140ff.

22 (1961) 28 D.L.R. (2d) 76 (S.C.C.), aff'g 23 D.L.R. (2d) 341 (Ont. C.A.).

23 (1961) 28 D.L.R. (2d) 76.

24 Id. at 77.

25 Beaver Valley Developments Ltd. v. Township of North York and Dominion Insurance Corp. (1960) 23 D.L.R. (2d) 341.

26 Id.

27 Id. at 344.

28 Id. at 341, 346.

29 (1961) 28 D.L.R. (2d) 76 at 77.

30 Id. at 76.

31 Id. at 78.

32 Id. at 78-79.

33 Id. at 77.

34 (1961) 28 D.L.R. (2d) 76.

35 Id.

36 E.g. Planning Act R.S.A. 1980, c.P-9, s.42(1)b,(ii), (iii).

37 Municipal Act, R.S.B.C. 1979, c.290, s.729 (2), (11), (13); Planning Act, R.S.A. 1980, c.P-9, ss.96(2), 98(d), 99(2)(3)(4); Urban and Rural Planning and Development Act, R.S.S. 1983, c.P-13, ss.114(1), (2)(b), (4), 115(2); The Planning Act, S.O. 1983, c.1, ss.41(1)(3)(6), 50(5) (a) 8; The Planning Act, S.N.S. 1983, c.9, s.1, ss.91(2)e, 92(1)-(5).

38 E.g., Planning Act, S.O. 1983, c.1, s.50(5); Municipal Act, R.S.B.C. 1979, c.290, s.71(1), 719(1); Planning Act, R.S.A. 1980, c.P-9, s.92(1)(b)v.

39 (1960) 20 D.L.R. (2d) 174, (1959) 28 W.W.R. 428 (B.C.).

40 (1950) 2 W.W.R. 1253.

41 (1955) 15 W.W.R. 143.

42 (1950) 2 W.W.R. 1253 at 1255.

43 (1959) 28 W.W.R. 428 at 429-30.

44 *Id*. at 430.

45 *Id*. at 431.

46 (1955) 15 W.W.R. 143 at 144.

47 *Id*. at 143.

48 *Id*. at 144.

49 (1981) 15 M.P.L.R. 40 (B.C.S.C.).

50 *Id*. at 42.

51 *Id*. at 40-44.

52 *Id*. at 44.

53 *Id*. at 41.

54 [1977] 1 S.C.R. 71, [1976] 3 W.W.R. 97, 7 N.R. 550. The grounds for review approved by the Supreme Court were those of the judge at first instance, Kirke Smith J., who stated:

> "I start from the premise that on an appeal of this nature it is at least as true today as it was in 1954 (per Coady, J in Re Land Registry Act; Re Proposed Subdivision (1955) 15 W.W.R. 143) that:
>
> > 'There are many reasons why municipal corporations should have and are given a measure of control over proposed subdivisions and the court should not on appeal lightly interfere with the decision of the approving officer.'
>
> Where, as here, there is a direct statutory foundation to approve or disapprove, and where it is not shown that that decision, despite its impact on the individual, was made in bad faith, or with the intention of discriminating against that individual, or on a specious or totally inadequate factual basis, there should, in my opinion, be no

> interference by the court with municipal officials honestly endeavouring to comply with the duties imposed on them by the Legislature in planning the coherent and logical development of their areas."

55 (1981) 15 M.P.L.R. 40 at 46.

56 Id. at 47.

57 Id. at 47-48.

58 Id. at 47, 48.

59 (1980) 18 B.C.L.R. 272.

60 Id. at 272-73.

61 Id. at 272.

62 Id. at 275.

63 Id. at 276.

64 Id.

65 Id.

66 Id. at 277.

67 (1978) 9 B.C.L.R. 220 (B.C.S.C.).

68 Id. at 221.

69 Id.

70 Id. at 223.

71 Id.

72 Id. at 223-24. Sections 711 (1)(d) and 713(1) of the Municipal Act state:

> 711(1) The Council may regulate the subdivision of land, and for that purpose may by by-law ...
>
> (d) require that the highways within the subdivision be cleared, drained and surfaced to a prescribed standard, including the construction of sidewalks and boulevards, transit bays, and the installation of street lighting and underground wiring, and

may prescribe different standards, provisions and uses in different zones of the municipality.

713(1) Where land is being subdivided, the owner shall not be required on subdivision to provide without compensation:

(a) for the purpose of a highway allowance within the subdivision, land exceeding in depth sixty-six feet; or

(b) for the purpose of widening a highway that is less than sixty-six feet in width and that borders or is within the subdivision, land of a depth exceeding thirty-three feet or the difference between sixty-six feet and the width of the highway, whichever is the lesser.

73 Id. at 242.

74 (1950) 2 W.W.R. 1253 (B.C.).

75 (1978) 9 B.C.L.R. 220 (B.C.S.C.) at 224.

76 Id. at 224, 225.

77 Re Land Registry Act; Re Proposed Subdivision (1955) 15 W.W.R. 143.

78 (1981) 15 M.P.L.R. 40.

79 (1980) 18 B.C.L.R. 272.

80 (1975) 60 D.L.R. (3d) 405, 9 O.R. (2d) 349.

81 (1976) 1 M.P.L.R. 277, 14 O.R. (2d) 687.

82 (1976) 6 O.M.B.R. 278.

83 (1983) 15 O.M.B.R. 75.

84 (1975) 9 O.R. (2d) 349.

85 Id.

86 Id.

87 Id.

88 Re Pinetree Development Co. Ltd. v. Minister of Housing of the Province of Ontario (1976) 1 M.P.L.R. 277; 14 O.R. (2d) 687; Hay et al. v. The Corporation of the City of Burlington, (1981) 16 M.P.L.R. 292 (Ont. C.A.); Re Steel Co. of Canada Ltd. and the City of Nanticoke (1976) 6 O.M.B.R. 278.

89 (1976) 1 M.P.L.R. 277 at 279.

90 Id. at 282.

91 Id. at 279.

92 Id. at 280.

93 Id.

94 Id.

95 Id. at 285.

96 Id. at 278.

97 Id. at 287.

98 Id. at 285.

99 Id. at 285, 286.

100 Id. at 285.

101 Id.

102 Id.

103 (1981) 16 M.P.L.R. 292 (Ont C.A.).

104 Id. at 294.

105 Id.

106 Id.

107 Id.

108 Id. at 293.

109 Id. at 297.

110 *Id*.

111 (1976) 1 M.P.L.R. 277.

112 (1976) 6 O.M.B.R. 278.

113 *Id*. at 279-80.

114 *Id*. at 280, 282.

115 *Id*. at 282.

116 *Id*. at 283.

117 (1977) 2 M.P.L.R. 1 at 3.

118 *Id*.

119 *Id*. at 10.

120 *Id*. at 11.

121 *Id*.

122 *Id*.

123 *Id*.

124 *Id*. at 10.

125 *Id*.

126 *Id*.

127 (1980) 10 O.M.B.R. 276 at 282.

128 (1983) 15 O.M.B.R. 75.

129 *Id*. at 82.

130 (1980) 10 O.M.B.R. at 276.

131 *Id*. at 282.

132 *Id*. at 284.

133 *Id*. at 283, 284.

134 *Id*. at 283.

135 *Id*. at 284.

136 *Id*.

137 *Id*.

138 (1983) 15 O.M.B.R. 75.

139 (1980) 10 O.M.B.R. 276.

140 (1983) 15 O.M.B.R. 75 at 76.

141 *Id*. at 91.

142 *Id*. at 92-93.

143 *Id*. at 93.

144 *Id*. at 100.

145 *Id*.

146 *Id*.

147 *Id*. at 111-112.

148 (1975) 9 O.R. (2d) 239.

149 (1983) 15 O.M.B.R. 75 at 81.

150 *Id*.

151 *Id*. at 82.

152 *Id*. at 84.

153 *Id*. at 85,102.

154 *Id*. at 97.

155 *Id*.

156 *Id*.

157 *Id*. at 92.

158 *Id*. at 100.

159 *Id*. at 78.

160 *Id*. at 97-98.

161 *Id*. at 102.

162 *Id*. at 99-100.

163 (1986) 35 M.P.L.R. 9 (Alta. C.A.).

164 *Id*. at 12.

165 *Id*. at 15.

166 *Id*. at 11.

167 *Id*.

168 *Id*. at 10.

169 *Id*. at 12.

170 *Id*. at 15.

171 Unreported, 19 September, 1986, Board Order 314-S-86/87.

172 *Id*. at 29.

173 *Id*. at 27.

174 *Id*. at 6. The relevant parts of ss.76 and 77 provide as follows:

> 76(1) For the one or more purposes referred to in subsection (2), a council may by by-law
>
> (a) provide for the imposition and payment of a levy to be known as an off-site levy, in respect of land that:
>
> (i) is to be developed or subdivided, and
>
> (ii) was not previously the subject of an off-site levy under this Act or section 242.1 of the Municipal Government Act as it read immediately before 1 April, 1978;
>
> (b) authorize an agreement to be entered into in respect of the payment of the levy.
>
> (2) An off-site levy may be used only to pay for all or part of the capital cost of all or any of the following:
>
> (a) new or expanded facilities for the storage, transmission, treatment or supplying of water;

(b) new or expanded facilities for the treatment, movement or disposal of sanitary sewage;

(c) new or expanded storm sewer drainage facilities;

(d) land required for or in connection with any facilities described in clauses (a) to (c).

(3) An off-site levy imposed under this Act may be imposed once only in respect of land that is the subject of a development or a subdivision.

77(1) A council may require with respect to a development that, as a condition of issuing a development permit, the applicant enter into an agreement to do all or any of the following:

...

(c) to install or pay for the installation of utilities that are necessary to serve the development;

...

(e) to pay an off-site levy or redevelopment levy imposed by by-law.

175 Id. at 7.

176 Id.

177 Id.

178 Id.

179 Id.

180 Id.

181 Id. at 8-9, 11.

182 Id. at 21.

183 Id.

184 Id. at 25.

185 Id. at 28.

186 Id. at 33-34.

187 *Id*. at 25.

188 *Id*. at 26.

189 *Id*.

190 *Id*. at 29.

191 *Id*. at 27.

192 *Id*. at 28.

193 *Id*.

194 *Id*. at 33-34.

195 *Id*. at 34.

196 *Id*.

197 *Id*.

198 *Thiessen Cattle Ltd.* v. *Alberta Planning Board* (1986) 35 M.P.L.R. 9 at 12.

199 *In the Matter of the Planning Act*, unreported, 19 September 1986, Board Order 314-S-86/87 at 28.

200 (1983) 15 O.M.B.R. 75 at 82,84.

201 *Oak Bay Manor Ltd.* v. *Corporation of Delta* (1981) 15 M.P.L.R. 40 (B.C.S.C.); *Re Mills and Land Division Committee of York* (1975) 9 O.R. (2d) 349.

202 *Oak Bay Manor Ltd.* v. *Corporation of Delta* (1981) 15 M.P.L.R. 40 at 47-48.

203 (1977) 2 M.P.L.R. 1 at 10.

204 *Id*.

205 (1983) 15 O.M.B.R. 75 at 85, 102.

206 *Id*. at 84.

207 *Thiessen Cattle Ltd.* v. *Alberta Planning Board* (1986) 35 M.P.L.R. 9 at 12; *In the Matter of - the Planning Act*, unreported, 19 September 1986, Board Order 315-S-86/87 at 27.

208 *In the Matter of the Planning Act*, unreported, 19 September 1986, Board Order 314-S-86/87 at 27.

209 Id. at 34.

210 Re Municipal Act, Re By-Law No. 1655 of Surrey District (1959) 28 W.W.R. 430.

211 Hay et. al. v. The Corporation of the City of Burlington (1981) 16 M.P.L.R. 292 (Ont. C.A.); Pinetree Development Co. Ltd. and the Minister of Housing of the Province of Ontario (1976) 1 M.P.L.R. 277; 14 O.R. (2d) 687 277; Dyck v. Stinson (1978) 9 B.C.L.R. 220 (B.C.S.C.).

212 Re Steel Co. of Canada Ltd. and the City of Nanticoke (1976) 6 O.M.B.R. 278.

213 Re Steel Co. of Canada Ltd. and the City of Nanticoke (1976) 6 O.M.B.R. 278.

214 Re George Wimpey Ltd. and Regional Municipality of Durham (1983) 15 O.M.B.R. 75.

CHAPTER V: THE APPLICATION OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS TO LAND USE PLANNING: EXCLUSIONARY ZONING

This chapter will examine the effect of the Charter on exclusionary zoning. While exclusionary zoning significantly restricts the individual's mobility and freedom of choice it is by no means certain that these rights and freedoms are protected by the Charter. The application of the Charter to exclusionary zoning will depend upon an expansive interpretation of concepts such as equal protection, discrimination, and liberty.

Section 15(1), which is the Section of the Charter most relevant to the problem of exclusionary zoning, presents various interpretive problems. Recently, the provincial appellate courts and the Federal Court of Appeal have divided over the interpretation of the phrase "without discrimination" and the question of whether the individual must first establish that the distinction created by legislation is unreasonable before the government need justify the law under s.1 of the Charter.[1] Other issues of importance are: whether s.15(1) provides protection against legislation which has an adverse and disparate effect on one group or class of individuals; what criteria will be adopted by the courts in determining classifications created by the different laws; whether a hierarchy of classifications will be created, so that the grounds listed in s.15(1) will, in some way, be granted a greater degree of protection than the unlisted ones; and finally, whether corporations can enjoy the rights created by s.15(1).

Section 7, which is relevant to questions both of exclusionary zoning and the regulation of property rights, also has many problems associated with its interpretation. To date, the content of "life, liberty and the security of the person" has not been defined, although three members of the Supreme Court of Canada have indicated that they may support a broad definition of liberty.[2] Such an interpretation would protect rights not otherwise guaranteed by the Charter, thus providing further grounds for reviewing many exclusionary land use regulations. It would also allow the courts to use the general rights of s.7 to supplement the more specific rights of ss.2(a) and (d).[3] These latter sections, because they are so specific, may only prove to be of limited application to exclusionary zoning.

Throughout this chapter and the following one, reference will be made to American cases in the area of civil liberties, property rights, and land use planning. The reasons for this comparative approach are two-fold. Although Canadian and American land use planning legislation is dissimilar, many of the key planning techniques used in Canada have been based on American innovations. In addition, American courts have had a comparatively lengthy history of assessing the validity of zoning and specialised land use regulations against constitutional guarantees of individual rights and liberties. Although the Supreme Court of Canada has stated that American decisions will not be determinative of issues before Canadian courts,[4] these decisions will still be of value in highlighting the issues which may arise as a result of the application of the Charter to land use planning.

The United States Constitution contains two provisions which, historically, have proven to be applicable to questions of the validity of land use planning regulations. These provisions are the Fifth and Fourteenth Amendments. While the Fourteenth Amendment contains an equal protection clause similar to that found in s.15(1) of the Charter, the Fifth Amendment contains a just compensation clause which has no direct parallel in the Charter. Therefore cases decided under that clause may have little direct application to the analysis of planning legislation under the Charter. However, they do provide an example of how some courts have analysed the validity of planning legislation in light of constitutionally protected property rights.

The Fourteenth Amendment of the Constitution states:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment reads, in its relevant part,

> No person shall be ... deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

The just compensation clause of the Fifth Amendment, although strictly applicable only to federal legislation, has been incorporated by judicial fiat into the Fourteenth Amendment and is therefore applicable to state regulatory action.[5]

A. Interpretive Problems Associated With The Charter

Prior to discussing the application of the Charter to the specific exclusionary zoning techniques previously outlined in Chapter II, it will be useful to highlight the relevant issues surrounding the interpretation of ss.7, 15(1) and 2(a) and (d). As well, a brief review of the significant Supreme Court of Canada and provincial appellate court decisions on s.1 of the Charter will provide a list of the considerations applicable to determining whether a given restriction is a reasonable and demonstrably justifiable limitation on individual's rights and freedoms. Some of the issues raised will also be germane to a discussion of the Charter's affect on land use regulations affecting property rights.

1. Section 15(1)

Section 15(1) reads:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Testimony before the Special Hearings of the Joint Committee of the Senate and House of Commons on the Constitution of Canada ("the Special Joint Hearings") shows that the drafters of the Charter intended that s.15(1) would provide Canadians with stronger equality rights than those given under the Canadian Bill of Rights.[6] The testimony shows that the phrase "equality before and under the law" was included to ensure that judicial review extended beyond the administration of the law to its substance.[7] The right to the "equal benefit of the law" was included to guarantee that the distinction made by the Supreme Court of Canada in Bliss v. Attorney-General of Canada[8] between the benefit and the penalties of the law was not continued under the Charter.[9] The phrase "equal protection of the law" was deliberately inserted in order to underline that s.15(1) enacted a "positive" concept of equality.[10] To quote the former Minister of Justice, The Honourable Jean Chretien, "a provision of 'equality rights' must demonstrate that there is a positive principle of equality in the general sense and, in addition, a right to laws which assure equal protection and equal benefits without discrimination."[11]

Notwithstanding the intention of the drafters of the Charter, s.15(1) of the Charter leaves many interpretive problems to be solved by the courts. One issue, which is relevant to a discussion of the Charter's effect on exclusionary zoning, is whether s.15(1) creates a right of equality of opportunity or equality of result.[11A]

Anne F. Bayefsky, in a series of articles and monographs, has argued that the wording of s.15(1), in particular the phrases "equal protection of the law" and "equal benefit of the law", is amenable to an interpretation favouring the creation of equality of result rather than simply equality of opportunity.[12] Bayefsky supports her argument by referring to a series of American decisions under the Fourteenth Amendment which indicate that the right to exercise certain fundamental freedoms cannot be denied to individuals regardless of social status, wealth, race, or ethnic origin.[13] Bayefsky further suggests that the concept of equality of result is consistent with the modern Canadian view of the capacities and responsibilities of government, noting that Canadian society expects certain minimum standards of welfare to be provided to each individual.[14] Finally, Bayefsky supports her argument by pointing out that the Charter itself contains an affirmative action clause in s.15(2) and recognises various group rights.[15]

Other commentators have been less willing to concede that s.15(1) can be used to achieve equality of results, arguing that Canadian society, at present, does not accept such a concept.[16] The Office of the Ministry of the Attorney-General of Ontario, for example, has adopted the position that s.15(1) protects equality of opportunity in respect of non-economic resources or benefits:[17]

> The Charter is not designed to revamp our legal, political or social system. All the Charter seems to require is that people have a fair chance to benefit from whatever government offers. It does not demand a redistribution of resources.

Nevertheless, the Attorney-General's Office concedes that the equality rights provision has a positive connotation, and the right to equality "may require an extensive application through a prohibition against constructive discrimination and a positive response to differences."[18]

Marc Gold, in his analysis of equality rights, has suggested that Canadian views on equality represent a compromise between equality of results and equality in terms of the universal application of the laws.[19] William Black has recently agreed with this assessment, stating that a test of equality strictly limited to the right to treatment as equals would fall short of reflecting prevailing conceptions of equality, just as a test mandating universal equality of results would go too far.[20]

To date, no Canadian court has had the opportunity to rule on this aspect of s.15(1). Chief Justice Dickson, in dicta, has stated that "... the interests of true equality may well require differentiation",[21] a statement which suggests an interpretation of s.15(1) consistent with the position of the Office of the Ontario Attorney-General quoted above. Other courts, notably the British Columbia Court of Appeal and the Federal Court of Appeal have adopted an interpretation of s.15(1) which emphasizes the concept of equal treatment by the laws of similarly situated classes of individuals.[22] However, these courts have dealt solely with situations where traditional concepts of equality of treatment were at issue and where there was no need to explore the outer reaches of s.15(1).

Whether or not s.15 creates a right to universal equality is of some importance to exclusionary zoning. Municipal land use by-laws play an important role in determining the availability of housing, its location, form, and cost.[23] The importance of housing in ensuring a minimum level of economic well-being and its role in aiding rehabilitative processes has been widely recognised during the last three decades.[24] By persisting in some of the policies outlined in Chapter II, municipal governments effectively deny certain segments of Canadian society access to this essential benefit. An interpretation of s.15(1) that stresses a concept of universal equality would obviously strengthen an individual or group's claim for access to low-density residential districts.

A related issue is whether s.15(1) protects individuals and groups only from intentional discrimination or whether it also protects them against laws having an unintended but disparate and adverse impact.[25] The resolution of this issue will also help determine how widely s.15(1) will be applied to the problems of exclusionary zoning. An approach that requires distinctions between groups to be made explicit or, if not explicit, be backed by proof of a discriminatory intent would severely limit the application of s.15(1). Likely, the only situations in which the courts would find a breach of s.15(1) would be those where circumstantial evidence established an illicit purpose behind land use planning by-laws, or a complete disregard for the interests of a group or class of persons.[26] An interpretation of s.15(1) that also focused on the effect of land use by-laws would permit the courts to review such devices as discretionary development permits, large lot zoning, and the imposition of subdivision exactions. As explained in Chapter II, these planning devices can have unintended, yet significant, exclusionary effects.[27]

Again, there has been no decision explicitly on this point. However, in R v. Big M Drug Mart Ltd., the majority of the Supreme Court of Canada stated that, in some circumstances, an effects test would be appropriate:[28]

> Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

In a concurring opinion, Madame Justice Wilson also said,[29]

> The first stage of any Charter analysis, I believe, is to enquire whether legislation in pursuit of what may well be an intra vires purpose has the effect of violating an entrenched right or freedom.

In R v. Big M Drug Mart Ltd., s.2(a) of the Charter, providing for the freedom of religion, was in issue. However, the statements of the members of the Court were couched in broad terms, and there appears to be no reason why they should apply only to s.2(a) of the Charter. Moreover, the Supreme Court of Canada in Canadian National Railway Co. v. Bhinder and Canadian Human Rights Commission has recently stated that both the Federal Human Rights Act and the Ontario Human Rights Code protects individuals against legislation having an unintended but discriminatory effect.[30] It is significant that Mr. Justice McIntyre, writing for the majority, stressed the special nature and purpose of human rights legislation and argued that this factor necessitated a flexible application of the accepted rules of statutory construction.[31] A similar argument could be made with respect to the interpretation of s.15(1) of the Charter.

American authority concerning equality rights protection and disparate impact under the Fourteenth Amendment reveals that the United States Supreme Court has refused to take into account unintended effects on groups of individuals. Under the Fourteenth Amendment the United States Supreme Court has stated that proof of discriminatory intent or purpose is required to show a violation of the equal protection clause.[32]

The leading decision in the field of land use planning is Village of Arlington Heights et al. v. Metropolitan Housing Development Corporation[33] ("Arlington Heights"). Metropolitan Housing Development Corporation ("MHDC") was a non-profit corporation organized for the purpose of constructing federally-assisted low-cost housing. The land it had acquired for the purpose of constructing a housing project was zoned as single family residential. MHDC applied for a rezoning amendment. In a series of public meetings it was made clear that the housing project would be federally subsidized and that, as a condition of this financial assistance, MHDC had been required to submit a plan for racial integration in the housing project. At the time, the overwhelming majority of Arlington's population was Caucasian, while the people eligible for public housing were largely black or Mexican-American.[34] At the public meeting, both the planning aspects of the housing project and the "social issue" were discussed.[35] The local council members, who had previously approved applications for other apartment buildings, denied MHDC's application.[36] This decision severely affected the ability of minority groups to acquire housing in Arlington.

MHDC appealed the council's decision through several levels to the level of the United States Supreme Court. The Supreme Court held that the council's decision had not violated the equal protection clause of the Fourteenth

Amendment.[37] The Court, citing the earlier decision of Washington v. Davis,[38] stated that "proof of racially discriminatory purpose is required to show a violation of the equal protection clause, and that proof of an adverse and disparate impact on a group of individuals was not sufficient."[39] The Court suggested the following as possible guidelines: the presence of an historical pattern of discrimination; the sequence of events leading to the decision; the presence of a disproportionate impact; and the existence of a substantial departure from normal procedure.[40] The Court also stated that a racially discriminatory purpose did not have to be the principal motivating factor behind a land use decision; it was sufficient that the discriminatory purpose be one of the factors leading to the decision.[41]

On the facts of the case, the Court held that, despite the disproportionate impact of the council's decision, history showed that the area had been zoned for single family dwellings since 1959 and that the housing project would not have complied with the established planning policy.[42] Contrary evidence put forward by MHDC demonstrating the inconsistent application of this policy was, in the opinion of the Court, not sufficiently strong to prove that the policy had been administered in a discriminatory manner.[43] In the Court's opinion, the Village of Arlington possessed valid planning reasons, namely concerns with increased traffic congestion, which justified denying the application.[44]

In Personnel Administrator of Mass. v. Feeney, the United States Supreme Court further narrowed the definition of discriminatory purpose by holding that[45]

> 'discriminatory purpose' however, implies more than intent as volition or intent as awareness of consequences ... It implies that the decision-maker, in this case a State legislature, selected or reaffirmed a particular course of action at least in part 'because of', not merely 'in spite of' its adverse effects upon the identifiable group.

This statement suggests that a finding of discriminatory purpose requires proof of antipathy or intent to cause disadvantage to a group.[46]

The American decisions provide one view of the scope of protection afforded by equality rights provisions. Clearly, the Canadian courts do not have to adopt a similar approach; indeed, the Supreme Court of Canada has recently stated that American decisions must be understood in their context and should not be applied slavishly to Canadian situations.[47] In this regard, it should be noted that American jurisprudence in the area of equal protection is based upon a hierarchy of standards of scrutiny: minimum scrutiny, strict scrutiny and, arguably, a form of intermediate scrutiny.[48] The standard of scrutiny exercised by the courts depends upon the grounds of distinction created by the legislation under review. For example, racial grounds attract strict scrutiny, while economic grounds attract minimal scrutiny.[49] In order to meet a standard of minimum scrutiny, the distinction created by the legislation need only be rationally related to the end sought to be achieved.[50] When strict scrutiny analysis is applied, the law must be justified as being necessary to achieve a compelling governmental interest.[51] In practice, most laws survive the minimum scrutiny test, but are declared unconstitutional when strict scrutiny analysis is used.[52]

Thus, William Black has recently argued that the American cases outlined previously should be understood as being concerned primarily with determining appropriate levels of scrutiny, not with the question of whether disparate impacts are themselves unreviewable under the Fourteenth Amendment.[53] Black argues that in _Washington_ v. _Davis_ and _Arlington Heights_ the principal focus of the United States Supreme Court was whether the distinction created by the legislation could be classified as being racially motivated, thereby invoking strict scrutiny. Similarly, in _Personnel Administrator of Mass._ v. _Feeney_, the initial question was whether the distinction created by the applicable legislation attracted the more stringent scrutiny of gender-based classifications.[54] These decisions can therefore be interpreted as stating that proof of a disparate impact cannot, by itself, provide a sufficient reason for American courts to invoke strict scrutiny analysis.[55]

Other reasons for disregarding the American authority on this issue reflect individual views of the scope of s.15(1). If the Charter is meant to provide a means of achieving equality of result, as argued by Bayefsky,[55A] then an interpretation of s.15(1) favouring a disparate impact analysis clearly makes that goal more achievable. Even if s.15(1) does not provide a vehicle for the wholesale redistribution of wealth, a view of s.15(1) that incorporates a disparate impact analysis would permit judicial review of legislation and regulations that create distinctions not based on antipathy towards a group of individuals.[56] These distinctions, even though unintended, may still place certain groups at a significant disadvantage.

A third issue relevant to exclusionary zoning is whether classifications based on wealth and social status can be included in the non-enumerated grounds of s.15(1). If s.15(1) provides a means of reviewing legislation denying disadvantaged groups the equal protection and benefit of the law, then many of the zoning techniques outlined previously in Chapter II could be subject to challenge.

Many accepted zoning practices, such as large lot zoning and the imposition of subdivision exactions, help segregate a community along social and economic lines and deny some individuals access to residential areas with adequate public facilities, transport, parks, and proximity to places of work.

Section 15(1) enacts a list of prohibited grounds of discrimination. During the Special Joint Hearings, several members of the Committee expressed concern as to whether the words "in particular" would restrict the prohibited grounds to those listed in the final version of s.15(1).[57] Both the Solicitor-General and the Justice Minister stressed that the words "in particular" were not intended to exclude other forms of classification.[58]

Yet, discussions in the Special Joint Hearings provide few indications of the criteria that the drafters considered appropriate for determining these other classifications. The Office of the Ontario Attorney-General has, however, argued that the members of the Committee of the Special Joint Hearings deliberately chose not to include economic and social rights such as the right to employment, health benefits, safe working conditions, social security, and an adequate standard of living with access to the necessities of life.[59] By extension, the Attorney-General's Office argues that the courts should not recognize classifications or groups based on social status or wealth as this would increase the chances of economic rights being recognized and afforded protection under the Charter.[60] At the same time, the Office of the Attorney-General recognizes that s.15(1) may have the effect of improving the economic position of Canada's poor and low-income residents because women, the disabled, and racial and ethnic minorities constitute a significant proportion of these individuals. As a consequence, they may be able to gain access to specific benefits provided by government by arguing that they have been denied the equal protection of the law on the basis of one of the enumerated grounds of s.15(1).[61]

Since s.15(1) came into force, there has been little judicial discussion of either the enumerated grounds of discrimination or the criteria for establishing non-enumerated grounds.[62] In two decisions, however, the courts have attempted to formulate some principles by which non-enumerated grounds can be identified.[63] The first of these cases is the Federal Court of Appeal decision in Smith Kline & French Laboratories Ltd. et al. v. Attorney-General of Canada. ("Smith, Kline & French Laboratories Ltd.").[64] In that case, the argument, so far as it concerned s.15(1), dealt with a claim by the plaintiffs that the licensing system for medicines and processes used in the production of medicines established by s.41(4) of the Patent Act, R.S.C. 1970, c.P-4 discriminated against inventors of medicines. Under s.41(4), the Commissioner of Patents was obliged to consider, when establishing the applicable royalty rate, the desirability of making the given medicine available at the lowest price consistent with giving the patentee due reward for the research creating that medicine. The plaintiffs alleged that the rate established by the Commissioner was significantly lower than rates granted patentees of other products.[65]

The Federal Court (Trial Division) dismissed the plaintiffs' claim insofar as it was based on s.15(1).[66] The Court stated that there was no presumption of discrimination arising from the type of distinctions made by the patent legislation, and therefore it was encumbent upon the plaintiffs to prove that the ends sought by the legislation were not legitimate and the means adopted were not rationally related to the achievement of those ends. The Court found that the plaintiffs failed to establish either of these factors.[67]

The plaintiffs then appealed this decision to the Federal Court of Appeal where they were again unsuccessful insofar as their argument was based on an alleged infringement of s.15(1).[68] The Federal Court of Appeal, however, differed from the Trial Division in its interpretation of the equality rights provision.[69]

In discussing the concept of equality rights, the Federal Court of Appeal stated that, at the most fundamental level, equality meant the right of those similarly situated to receive similar treatment, and that the key in each case was to determine the relevant classifications established by the legislation.[70] While noting that there was no universal test for determining categories or classifications, the Court suggested three possible criteria.[71] First, the text of s.15(1) indicated that pejorative distinctions based on personal characteristics listed in s.15 or ones analogous to them were prohibited.[72] Second, it should be determined whether categories created by the legislation affected rights and freedoms guaranteed by the Charter, recognising that the Charter focused on personal rights and liberties. As a consequence, categories affecting property and economic rights would be subject to less scrutiny.[73] Third, the underlying values inherent in the free and democratic society suggested that certain types of legislation would be subject to judicial review.[74] In conjunction with this third point, the Court stated that the degree of judicial deference accorded classifications created by legislation would be greater when the classifications were express because it could be assumed that the wording of the legislation reflected the will of Parliament.[75]

In the end, the Federal Court of Appeal found that the categories created by s.41(4) of the Patent Act bore no relation to those enumerated in s.15(1) and carried no suggestion of any inequality based on prejudice or stereotypes, the interests at issue were purely economic and commercial, and the legislation constituted a direct and explicit expression of the Parliament's will that medicines should be made available at a reasonable cost.[76] As a consequence, the Court held that s.41(4) of the Patent Act did not breach s.15(1) of the Charter.[77]

The second case, Kask v. Shimizu[78], a decision of the Alberta Court of Queen's Bench, concerned a claim that Rule 593(1)(a) of the Alberta Rules of Court was inconsistent with s.15(1) of the Charter. Rule 593(1)(a) provided that

> security for costs may be ordered:
>
> (a) where the plaintiff resides out of Alberta.

The plaintiff, a resident of British Columbia, sued a resident Alberta doctor and an Alberta hospital for damages alleging negligence. The defendants made an application under the Rule for an order requiring the plaintiff to post security for costs in the amount of $20,000. The plaintiff could not afford this amount.[79]

Mr. Justice MacDonald of the Alberta Court of Queen's Bench held that Rule 593(1)(a) breached the plaintiff's right to the equal protection and benefit of the law because it created a distinction on the basis of a person's wealth which resulted in depriving the less wealthy of access to the courts.[80] His Lordship held that s.1 of the Charter did not protect Rule 593(1)(a) from invalidity because it could not be proven that the concern addressed by the Rule was "pressing and substantial in a free and democratic society."[81] Further, even if the objective underlying the Rule was sufficiently important, the Rule impaired the right of access more than was necessary.[82]

In arriving at the first conclusion, his Lordship made several points relevant to the issue of whether s.15(1) protects individuals and groups against wealth-based discrimination. Citing Chief Justice Dickson in R v. Oakes[83] and R v. Big M Drug Mart Ltd,[84] his Lordship stated that it was necessary to determine the purpose of s.15(1) in light of the values and principles underlying the Charter.[85] Again citing from Chief Justice Dickson's judgment in R v. Oakes,[86] his Lordship described these values as[87]

> respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

Section 15(1) enhanced those principles by ensuring that the dignity of the individual was respected in Canadian society despite differences in culture, race, and origin.[88] In turn, this sense of equality of treatment and opportunity tended to increase the individual and the group's respect for and participation in the social and political institutions of the country.[89]

Mr. Justice MacDonald then noted that s.15(1) linked the right to the equal protection and benefit of the law to the absence of discrimination based on a non-exhaustive list of grounds.[90] In determining the non-enumerated grounds, his Lordship stated that the central issue was whether the alleged acts of discrimination undermined the essential and underlying values of a free and democratic society.[91] Analysing the grounds listed in s.15(1), his Lordship found that two forms of discrimination were prohibited by this Section: discrimination based on an immutable personal characteristic and discrimination based on some characteristic protected by another Charter guaranteed right or freedom.[92]

In the case before him, Mr. Justice MacDonald held that access to the administration of justice was fundamental to the concept of Canada as a society founded on the rule of law.[93] Consequently, a Rule of Court which, on the facts, raised a financial barrier to the plaintiff's access to the judicial system and created a distinction on the basis of wealth breached the right of equal protection and benefit of the law.[94]

Subsequently, in the case of Singh v. Dura, Mr. Justice Berger of the Alberta Court of Queen's Bench held that Rule 593(1)(a) of the Alberta Court of Queen's Bench did not offend s.15(1) of the Charter.[95] His Lordship, while agreeing with aspects of Mr. Justice MacDonald's judgment in Kask v. Shimizu, provided his own interpretation of s.15(1).[96] In his Lordship's view, s.15(1) was to be interpreted as precluding legislative classifications or distinctions between similarly-situated individuals premised on arbitrary and capricious factors, of which the enumerated grounds listed in s.15(1) were examples.[97] His Lordship found that Rule 593(1)(a) did not create a distinction between similarly situated groups of individuals, was not arbitrary or capricious, and did not demonstrate partiality or prejudice.[98]

American experience under the equal protection clause of the Fourteenth Amendment shows that the United States Supreme Court has adopted an ambivalent approach to wealth-based classifications. In a number of decisions, the United States Supreme Court has struck down legislation effectively denying the poor the opportunity to vote in local referenda,[99] creating residency requirements for social security benefits,[100] and erecting monetary barriers to the poor's right to litigate in the courts.[101] However, in other cases,[102] the United States Supreme Court has held that legislation having a disproportionate adverse impact on the poor is not subject to strict scrutiny analysis, and that it is not the court's role to redistribute wealth.

The leading decision in the field of land use planning is James v. Valtierra.[103] This case concerned the validity of a provision of the California State Constitution which prohibited the construction of low-cost housing unless the project was approved by local residents in a referendum.[104] The majority of the United States Supreme Court rejected the argument that the provision offended the Fourteenth Amendment because it created procedural roadblocks to the ability of the poor to acquire housing.[105] The majority distinguished an earlier case, Hunter v. Erickson,[106] in which the use of the referendum process to deny affirmative housing measures for racial minorities was declared to be a violation of the Equal Protection Clause. The Supreme Court of the United States stated that the California State Constitution was neutral on its face because it did not establish an explicit racial classification, and held that the applicants had been unable to provide contrary evidence of a discriminatory motive.[107] The Supreme Court distinguished the poor from racial minorities, stating that members of disadvantaged economic groups could not invoke the Equal Protection Clause by resting their claim on alleged racial discrimination.[108] The Court dismissed the argument that the mandatory referendum procedure was unconstitutional, stating that a procedure which "merely disadvantages a particular group does not deny that group equal protection."[109] In a brief passage, the Court indicated that referenda were an integral part of the democratic process, rather than mechanisms of potential bias or discrimination.[110]

In a second decision, Lindsey v. Normet, the United States Supreme Court upheld the validity of landlord/tenant legislation that sought to make the resolution of rental disputes more efficient by making it more expensive for the tenant to dispute the landlord's claims for non-payment of rent.[111] The legislation required the landlord to sue for repossession of the premises rather than exercise his common law right of distraint, it provided that the rental dispute was to be heard within six days after service of a notice to quit unless the tenant provided security for the rent, and it made hearing of the tenant's appeal conditional upon the tenant posting a bond valued at double the amount of the disputed rent.[112]

The United States Supreme Court upheld the validity of the landlord/tenant legislation against claims that it violated the Fourteenth Amendment.[113] In the opinion of the United States Supreme Court, the legislation had not expressly singled out one group of individuals for unequal treatment since all tenants were similarly affected.[114] The Court further held that any possible classification between wealthy and poor tenants created by the legislation was not a "suspect classification", and therefore the legislation need only be subject to a minimum scrutiny test.[115] The purpose of the legislation, namely to provide an efficient means of resolving rental disputes, clearly fell within the legitimate purposes of the State's regulatory power.[116] Further, the legislation favoured neither the landlord nor the tenant since the disadvantages suffered by the tenant were balanced by advantages such as the abolition of the landlord's common law right of distraint and the tenant's ability to retain possession of the premises until evicted by judicial order.[117]

In dicta, the United States Supreme Court stated that the Constitution did not guarantee access to dwellings of a particular quality.[118] Absent a constitutional guarantee, the task of ensuring adequate housing for all individuals fell to the legislature rather than the courts.[119]

The cases of James v. Valtierra and Lindsey v. Normet should be read in conjunction with the decision of San Antonio Independent School District v. Rodriquez.[120] In this latter case, the United States Supreme Court upheld the validity of a Texas State law that enabled school districts in the State to raise additional revenue through the imposition of a property tax. The property tax was the sole means by which school districts could raise additional revenue.[121] The Rodriguez family lived in a school district having a low property tax base; a district which by imposing the highest property tax in the State, was able to raise an additional amount of $26.00 per pupil. In contrast, other school districts, with higher property tax bases, were able to raise an additional $333 per pupil by imposing a lower tax.[122] Thus, a law which purported to provide each district with the equal opportunity to increase its revenue for its school expenditures, in fact, created a discrepancy between the wealthy and poor districts of the State of Texas.

The majority of the United States Supreme Court held that the State law did not violate the Fourteenth Amendment for two reasons.[123] First, the classifications created by the law were not "suspect" classifications. Second, education, while an important right, was not a fundamental one and was therefore not entitled to strict scrutiny analysis.[124]

The Supreme Court distinguished its earlier decisions of Griffin v. Illinois[125] and Douglas v. California[126] on the basis that the legislation or government action in question in those cases had "absolutely deprived a definable class of indigents of the opportunity to enjoy a benefit to which they were lawfully entitled."[127] The Rodriguez family could not establish that the Texas State law absolutely deprived a definable class of individuals of an opportunity to exercise a right to which they were entitled.[128] In the opinion of the majority of the Court the class of individuals potentially affected by the law was "large, diverse and amorphous."[129] Further, the Rodriguez family had not been absolutely deprived of a benefit provided by the State since the State provided a minimum level of education. The Rodriguez family could only allege that they had been unable to enjoy the same quality of education as people living in wealthier districts.[130] The majority of the Supreme Court stated that the equal protection clause of the Fourteenth

Amendment did not require absolute equality or the creation of precisely equal advantages.[131]

These three decisions of the United States Supreme Court highlight a number of problems associated with recognising wealth as an unconstitutional basis of discrimination. The first is the possibility that such recognition, when combined with a disparate impact test, would open the way for the Charter to be used to redistribute wealth. It is conceivable that the Canadian courts, like their American counterparts, would be faced with resolving issues such as whether all Canadians have the right not only to a minimum level of housing, education, and income, but a level more akin to that enjoyed by the middle classes. While this, in fact, may be a desirable goal, the argument can be made that it is not the judiciary's role to instigate such far-reaching social change.[132] Even though the Supreme Court of Canada has stated that it will not adopt a policy of judicial deference with respect to Charter-based review, it is uncertain whether it would be prepared to become so activist.

A second issue raised by the American decisions is whether the poor are, in fact, a definable class. Commentators on American constitutional law have listed factors which have seemingly guided the United States

Supreme Court in determining whether certain classifications warrant strict judicial scrutiny. These factors include an historical pattern of discrimination, inability to participate effectively in the political process, immutability of the principal characteristic defining the group, and the discrete and cohesive nature of the class.[133] American courts have held, in general, that poverty is not an immutable characteristic and that the poor do not constitute a discrete and cohesive class.[134] Instead, the American courts have adopted the view that only those individuals falling within a class of persons objectively definable as indigent and having an income below a designated poverty level will be protected by the Fourteenth Amendment.[135]

Finally, the American cases raise the question of whether equal protection provides every member of a society with the right to claim a precisely equal share of advantages created by legislation and government action. The American position quite clearly is that the equal protection clause of the Fourteenth Amendment does not create such a right. While the American courts have recognised that poverty should not block individuals from exercising certain fundamental democratic rights and civil liberties, they have not accorded rights derived from the social welfare system the same status.

The last issue relevant to the problem of exclusionary zoning is whether corporations may claim the benefit of the equality rights provision. While this point is possibly of greater importance to the question of the Charter's effect on property rights, it does have some bearing on the problem of exclusionary zoning. Often it is a non-profit corporation, either secular or religious, which sponsors group housing. In other cases, it is development companies, either with government financing or private funds, which erect low cost housing projects. If these corporations could not challenge exclusionary zoning devices on the basis of s.15(1), then individuals living in group homes or prospective residents of housing projects would have to assume the applicant's role.

The principal argument for denying corporations the equality rights of s.15(1) is based on that Section's wording. Section 15(1) speaks of "every individual" having the right to equal treatment before and under the law and to the equal protection and benefit of the law.[136] The phrase "every individual" was apparently chosen in distinction to the word "everyone", which is a term commonly used to indicate that both corporations and individuals may claim the benefit of a given piece of legislation.[137] Further, the enumerated grounds in s.15(1) all pertain to individual characteristics which cannot accrue to corporate bodies.[138] Canadian courts under the Canadian Bill of Rights have interpreted the phrase "every individual" as applying solely to human beings and not corporate entites.[139]

While a number of lower courts have stated that corporations cannot avail themselves of s.15(1),[140] the Supreme Court of Canada has not had the opportunity to rule on this point. In its decision of R v. Big M Drug Mart Ltd. ("Big M Drug Mart Ltd."), however, the Supreme Court of Canada has indicated that corporations may be able to invoke s.15(1) if they otherwise have standing under the Charter.[141] In Big M Drug Mart Ltd., the company had been charged with having violated the provisions of the Lord's Day Act, R.S.C. 1970, c.L-13. As part of its defence, the company argued that the Lord's Day Act infringed s.2(a) of the Charter. The Attorney-General of Canada, on the contrary, argued that the company could not rely on s.2(a) of the Charter because it could not have any religious beliefs.[142]

Chief Justice Dickson dismissed this argument, stating that the company was the accused under legislation which affected the rights of individuals under s.2(a) of the Charter, and could therefore invoke that Section in its defence.[143] In arriving at this conclusion, the Chief Justice noted:[144]

> It is the nature of the law, not the status of the accused that is at issue.

It has been argued that the Chief Justice's remarks allow corporations to challenge legislation on the basis that such legislation infringes s.15(1) of the Charter.[145] However, in Smith, Kline & French Laboratories Ltd v. Attorney- General of Canada, at the Trial Division of the Federal Court, Mr. Justice Strayer stated that the reasoning of Big M Drug Mart Ltd. could not be used to give corporate plaintiffs standing to raise s.15(1) in a declaratory action.[146] Mr. Justice Strayer distinguished Big M Drug Mart Ltd. on the grounds that the corporation had been prosecuted under the Lord's Day Act and, consequently, there was no question of its standing as an accused to raise any defence available to it.[147] Because Mr. Justice Strayer had earlier held that s.15(1) provided rights only to natural persons, the corporate plaintiff had no status to bring a declaratory action under that Section.[148] However, Mr. Justice Strayer suggested that courts might exercise their discretion and grant corporations standing to advance a s.15(1) claim when there was no other means by which the issue could be heard.[149]

It might be possible, therefore, for a corporation to seek a declaratory action on the basis of s.15(1) if a natural person, such as a prospective resident of low-cost housing or a member of a group home, either did not have standing or did not have the capacity to argue his case.

2. Section 7

Section 7 of the Charter states that:

> everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Whether this Section provides individuals with a basis for challenging the planning devices discussed in Chapter II will depend upon the manner in which the courts interpret the phrase "life, liberty and security of the person."

The context of s.7 indicates that its content is limited by the specific rights contained in ss.8-14. This has lead some commentators to argue that s.7 grants an individual the right of liberty to the extent that his physical integrity has been infringed by governmental action.[150] According to such commentators, the concept of liberty incorporates the legal rights of freedom from arbitrary detention and subjection to cruel and unusual punishment, the right to a fair and speedy trial, the right to bail, and the right not to be charged twice for the same offence.[151] Patrice Garant in Professors Tarnapolsky and Beaudoin's Commentary on the Canadian Charter of Rights and Freedom has stated that:[152]

> the term 'liberty' must be understood in a restrictive sense. Section 7 is concerned with physical liberty of the person, the right to dispose of one's body, of one's person; in this context the right to liberty cannot signify 'the right to a free exercise of human activity, contractual freedom, freedom of choice of life, of professional freedom.'

Other commentators have advocated a less constrained reading of s.7, arguing that s.7 creates rights distinct from those found in ss.8-14 and encompasses a concept of "positive liberty."[153] Such a definition would afford protection for a number of freedoms of importance to the individual but which are not expressly protected by s.2 of the Charter. These freedoms would include the freedom to adopt the type of family structure that fulfils one's needs for human companionship, a right of privacy, and the freedom to form associations for the purpose of providing moral and financial support to one another. In addition, and most importantly, a broad interpretation of "liberty" and "security of the person" would provide a means by which certain economic rights could be accorded constitutional status. These rights would include the freedom to contract, to earn a livelihood, and to own property, at least to the extent that property ownership secures a level of economic well-being.[154]

The American courts have adopted a broad definition of liberty. The word "liberty" in the Fifth and Fourteenth

Amendments has been interpreted to include a right to travel, a right of privacy, a right to life, a right of procreative freedom, and a right of association.[155] The definition most frequently cited has been that formulated by the United States Supreme Court in Board of Regents of State Colleges et al v. Roth:[156]

> while this Court has not attempted to defined with exactness the liberty ... guaranteed by the Fourteenth Amendment, the term has received much consideration and some of the included things have been definitively stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognised ... as essential to the orderly pursuit of happiness of free men. In the Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed.

Despite the breadth with which the United States Supreme Court has construed "liberty" in the Fourteenth Amendment, the Court has expressly upheld the validity of single family zoning by-laws against a challenge based upon the rights of privacy, association and travel. In the case of Village of Belle Terre v. Boraas, the applicant argued that a zoning ordinance limiting occupancy of single family dwellings to one or more persons related by blood, adoption, or marriage or to groups of two unrelated individuals violated his right of unrestricted mobility and his right to associate with his chosen companions in the privacy of his own home.[157] The applicant argued that his manner of living approximated that of a traditional family and should be given the same constitutional protection.[158]

Mr. Justice Douglas, writing for the majority of the United States Supreme Court, dismissed the claim that the applicant's fundamental rights had been infringed. Mr. Justice Douglas stated that the zoning ordinance did not created barriers to the exercise of the applicant's right to travel since it was not aimed at restricting the mobility of transient individuals.[159] Mr. Justice Douglas also held that the applicant's rights of privacy and association were not infringed, stating that "the ordinance places no ban on forms of association, for a family may, so far as the ordinance is concerned, entertain whom it likes".[160] This latter reference represented an attempt to distinguish Belle Terre from the earlier decision of Department of Agriculture v. Moreno, in which the United States Supreme Court held that the freedom of individuals to associate for social and economic reasons was a fundamental right.[161] In concluding his judgment, Mr. Justice Douglas reaffirmed the right of a municipality to enact zoning ordinances protecting the ambience and aesthetic value of the local community.[162]

Mr. Justice Marshall dissented from the majority in Belle Terre over their interpretation and application of the freedom of association.[163] Mr. Justice Marshall stated:[164]

> constitutional protection is extended not only to modes of association that are political in the usual sense, but also to those that pertain to the social and economic benefit of the members. The selection of one's living companions involves similar choices as to the emotional social or economic benefits to be derived from alternative living arrangements.

The Justice further held that the choice of household companions fell within the constitutionally protected right to establish a home.[165]

The decision of the Supreme Court of the United States in Belle Terre should be contrasted with that Court's later judgment in Moore v. City of Cleveland.[166] In that case, the City of Cleveland had enacted a single family zoning ordinance that restricted not only unrelated individuals from living together in large groups but also precluded certain related family members from inhabiting the same home.[167] Mrs. Moore, a grandmother who chose to live with her son and two grand-nephews, was consequently prohibited from living in a single family residential area.[168] She challenged the ordinance on the basis that it violated the the Fourteenth Amendment.[169]

The United States Supreme Court declared the ordinance to be unconstitutional, stating that it infringed the individual's freedom to select his or her family relationship.[170] The Court distinguished its earlier decision of Belle Terre on the grounds that the ordinance in Belle Terre affected only unrelated individuals.[171] The City of Cleveland's ordinance, on the other hand, dictated the manner in which a family, i.e. blood relations, could live together. In a highly significant passage, the Supreme Court classified the ability to make a choice concerning family living arrangements as a fundamental right.[172] As a consequence of this classification, the Court subjected the City of Cleveland's ordinance to an analysis based upon substantive due process.

The City of Cleveland had alleged that its ordinance sought to prevent overcrowding, minimise traffic and parking problems, and alleviate the financial burden on the City's school system.[173] While acknowledging that these were legitimate goals, the United States Supreme Court pointed out that the classification scheme adopted by the City permitted a family consisting of a husband and wife and unmarried children to live in one house although they may have owned numerous vehicles, but prohibited an adult brother and sister from living together, even though they may have used the public transport system.[174]

The Court further held that the ordinance did not serve its stated purpose of minimising overcrowding since certain types of family relationships were not subjected to numerical limitations while other families, such as that of Mrs Moore, were excluded from the district.[175] The Court also acknowledged the importance of an extended family as a means of providing emotional support and of alleviating financial strains.[176] The contrast with its decision in Belle Terre could not have been more obvious.

In Canada, lower court judgments have largely adopted a restricted interpretation of s.7. In Becker v. The Queen in Right of Alberta, the Alberta Court of Queen's Bench held that the rights and freedoms protected by s.7 were limited by the rights listed in ss.8 - 14, and that s.7 had no independent residual operation.[177] A similar interpretation was adopted by Mr Justice Strayer of the Federal Court, Trial Division in Re Groupe des Eleveurs de Volailles de l'est de l'Ontario et al. and Canadian Chicken Marketing Agency[178] and Smith, Kline & French Laboratories Ltd. v. Attorney-General of Canada[179] and by Mr Justice Pratte of the Federal Court of Appeal in The Queen et al v. Operation Dismantle Inc. et al.[180]
Other courts have held that economic and property rights are not included in s.7. These decisions include Milkboard v. Clearview Dairy Farm Inc.,[181] Re Aluminium Co. of Canada Ltd. and the Queen in Right of Ontario,[182] Hall v.

Attorney-General of New Brunswick,[183] Home Orderly Service Ltd. v. Manitoba,[184] Gersham Produce Company Ltd. v. The Motor Transport Board,[185] Manicom et al v. County of Oxford et al.,[186] Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission,[187] and Smith, Kline & French Laboratories Ltd. v. Attorney-General of Canada.[188]

The Supreme Court of Canada, in three decisions, has given contradictory views of the possible scope of s.7. Recently, in Edwards Books and Art Limited v. The Queen, Chief Justice Dickson stated that whatever the scope of s.7, it did not include the right to operate a business free of all restrictions.[189] In Re Public Service Employee Relations Act, Mr Justice McIntyre, writing a concurring majority judgment, stated that the Charter, as a whole, did not protect economic rights.[190] At the same time, the Chief Justice and Madame Justice Wilson, writing a common dissenting judgement, suggested that a person's livelihood and dignity in the workplace was protected by the Charter under s.2(d) if not under other sections.[191] In Re Singh and Minister of Employment and Immigration and six other appeals, Madame Justice Wilson, with whom Chief Justice Dickson and Justice Lamer concurred, stated:[192]

> ... the concepts of the right to life, the right to liberty and the right to security of the person are

> capable of a broad range of meaning.

Although Madame Justice Wilson referred to the Fourteenth Amendment of the United States Bill of Rights, citing the description of liberty found in Regents of State Colleges et al v. Roth,[193] she did not expressly state that this definition was applicable to s.7 of the Charter.[194]

3. Section 2(d): Freedom of Association

Section 2(d) of the Charter provides that:

> 2. Everyone has the following freedoms:
> ...
> (d) Freedom of association.

Under the Charter, freedom of association has the status of an independent right rather than one derived from other fundamental freedoms, as in American constitutional law, or one allied to the freedom of assembly, as in the Canadian Bill of Rights. The entrenched and independent status of the freedom of association differs fundamentally from its uncertain status prior to the enactment of the Charter.[195]

In the recent decision of Re Public Service Employee Relations Act (Alta.); Labor Relations Act (Alta.) and Police Officers Collective Bargaining Act (Alta.), ("Re Public Service Employee Relations Act") the Supreme Court of Canada discussed in some depth the possible scope of the protection afforded by s.2(d).[196] The majority of the Court, composed of Justices Le Dain, Beetz and La Forest in a joint judgment, and Mr. Justice McIntyre, in a concurring judgment, held that s.2(d) only protected the freedom to join together in an association and to participate in its activities, rather than the right to engage in a particular activity pursued by that association.[197] Specifically, these Justices held that Alberta labour legislation, which deprived certain unions of the right to engage in collective bargaining and the right to strike, did not infringe the Charter because these activities were not included in the freedom of association.[198] Chief Justice Dickson and Madame Justice Wilson, writing a joint dissenting judgment, held that freedom of association protected the activities, goals, and interests for which an association was formed, as well as the right to associate itself.[199]

Justices Ledain, Beetz and La Forest held that the freedom of association simply protected the freedom to work for the establishment of an association, to maintain it, and to participate in its lawful activity without penalty.[200] Their Lordships specifically stated that the guarantee afforded by s.2(d) did not extend to protect the activities of an association, no matter how essential those activities were to the interests of the individual members.[201] Their Lordships further noted that many of the important activities of an association could be adequately protected by other fundamental freedoms guaranteed by the Charter, for example, by the freedom of conscience and the freedom of expression.[202] Their Lordships expressed concern with the ramifications of deciding that the freedom of association extended to protect activities and goals of the individual members given the various purposes for which associations are formed. It was also clear that their Lordships did not wish to reverse the policy of judicial deference in labour relation matters by raising the possibility of constitutional review.[203]

Mr Justice McIntyre similarly held that s.2(d) of the Charter did not guarantee trade unions the right to negotiate in collective bargaining and the right to strike.[204] His Lordship acknowledged that freedom of association was of fundamental importance in a free society, because it served the interest of the individual, strengthened the general social order, and supported the functioning of democratic government.[205] However, his Lordship rejected the view, adopted by some lower court judges, that s.2(d) protected all activities or goals adopted by an association of individuals. In his Lordship's view, freedom of association was essentially an individual right, rather than one belonging to a group.[206]

The group therefore could not possess greater constitutional rights and freedoms than the individual members themselves possessed.[207] In summarising his approach to freedom of association, Mr Justice McIntyre stated:[208]

> ... the Charter will attach to the exercise in association of such rights as have Charter protection when exercised by the individual. Furthermore freedom of association means the freedom to associate for the purposes of activities which are lawful when performed alone. But since the fact of association will not by itself confer additional rights on individuals, the association does not acquire a constitutionally guaranteed freedom to do what is unlawful in association.

Prior to stating his view of the freedom of association, Mr. Justice McIntyre reviewed and discussed a variety of definitions of freedom of association adopted in lower court decisions. One such definition was that put forward by Mr. Justice Kerans of the Alberta Court of Appeal in Black v. The Law Society of Alberta:[209]

> In my view, the freedom [of association] includes the freedom to associate with others in the exercise of Charter-protected rights and also those other rights which - in Canada - are thought so fundamental as not to need formal expression: to marry, for example, or to establish a home and family, pursue an education or gain a livelihood.

Mr. Justice McIntyre rejected this approach because it focused on the activity for which the association was formed, rather than what his Lordship considered the fundamental purpose of freedom of association, namely to ensure that various goals may be pursued in common as well as individually.[210] His Lordship stated that:[211]

> While activities such as establishing a home, pursuing an education or gaining livelihood are important if not fundamental activities, their importance is not a consequence of their potential collective nature. Their importance flows from the structure and organisation of our society and they are as important when pursued individually as they are when pursued collectively. Even institutions such as marriage and family, which by their nature are collective, do not fall easily or completely under the rubric of freedom of association ... This is not to say that fundamental institutions, such as marriage, will never receive the protection of the Charter. The institution of marriage, for example, might well be protected by freedom of association in combination with other rights and freedoms. Freedom of association alone, however, is not concerned with conduct; its purpose is to guarantee that activities and goals may be pursued in common. When this purpose is considered, it is clear that s.2(d) of the Charter cannot be interpreted as guaranteeing specific acts or goals, whether or not they are fundamental in our society.

In distinction to the majority's position, Chief Justice Dickson and Madame Justice Wilson held that s.2(d) guarantees not only the liberty of persons to be in association but extends to provide "effective protection to the interest to which the constitutional guarantee is directed."[212] The Chief Justice and Madame Justice Wilson further held that the interests protected by s.2(d) were not limited to those otherwise protected by the Charter or ones political in nature.[213] Rather, the freedom of association protected the freedom of the individual "to interact with support and be supported by their fellow human beings in the various activities in which they choose to engage."[214] However, the Chief Justice and

Madame Justice Wilson also placed some limitations on the scope of the protection afforded by s.2(d), stating[215]

> that the mere fact that an activity is capable of being carried out by several people together as well as individually, does not mean that the activity acquires constitutional protection.

The judgements of the members of the Supreme Court of Canada illustrate a variety of opinion on the issue of whether freedom of association can protect the interests and activities of an association of individuals. For three of the majority judges, freedom of association is a relatively narrow concept protecting solely the person's right to form an association and participate in its activities. For the two minority judges freedom of association has wider scope, protecting not only the freedom of individuals to form groups but also the activities and goals of the association so formed. In the minority's opinion, a concept of freedom of association that does not protect the essential goals of an association would be ineffective and valueless.

Mr. Justice McIntyre's judgment falls between that of the three majority judges and that of the minority. His Lordship differs from the other majority judges in holding that freedom of association protects some activities of an association and not merely the right of individuals to join and participate in a group. His

Lordship differs from the minority in his view that the activities of an association are protected under s.2(d) of the Charter only if the association's members have a legal or constitutional right to engage in the activity. The minority, while agreeing with this proposition, are willing to extend the protection afforded by s.2(d) of the Charter to cover the goals and essential purposes of the association in order to make the fundamental goal of freedom of association more effective.

The significance of this is illustrated by Mr. Justice McIntyre's discussion of Black v. The Law Society of Alberta.[216] In that case, Mr. Justice Kerans had held that freedom of association protected the individual's freedom to associate with others in the exercise of certain fundamental rights such as marriage and establishing a home.[217] Mr. Justice McIntyre rejected this view of freedom of association because it emphasised the goal or purpose for which an association was formed and sought to give Charter protection to those goals under the rubric of freedom of association.[218] This emphasis, in the opinion of Mr. Justice McIntyre, obscured the fundamental role of freedom of association, namely to protect the right of the individual to join with others in exercising rights and engaging in activities that he would otherwise be unable to do alone.[219] In contrast, the minority would accord certain activities constitutional status by virtue of their collective nature. Thus, certain institutions like marriage and family and activities like obtaining shelter would be protected under s.2(d) of the Charter.

4. Section 2(a): Freedom of Religion

Section 2(a) of the Charter provides as follows:

> 2. Everyone has the following fundamental freedoms:
>
> (a) Freedom of conscience and religion.
>
> ...

This provision may be of assistance in challenging exclusionary zoning by-laws that affect the ability of religious groups to move into residential areas, small towns, or farming communities. Specifically s.2(a) would be available to religious groups, such as the Hutterites, whose beliefs demand that they live a communal lifestyle.

As with other sections of the Charter, there are a number of interpretive problems associated with s.2(a).[220] Among the ones relevant to a discussion of exclusionary zoning are: does s.2(a) protect only established religions; does the Charter protection extend only to laws regulating beliefs or does it extend to laws regulating conduct arising out of these beliefs; and does the Charter prohibit only laws intentionally affecting religion or does it prohibit laws whose effect on religion is unintended.[221] The first of these issues is likely only to arise where the individual seeking Charter protection adheres to a system of beliefs and values which differ from the majority view of religion. The other two issues, however, are likely to arise more frequently since zoning by-laws affect the conduct of religious groups rather than beliefs, and the effect of these by-laws may be unintended.[222]

Under pre-Charter law, decisions of the Canadian courts indicated religious freedom protected only religious belief and not conduct motivated by religious belief. In Robertson and Rosentanni v. The Queen, the case in which the Supreme Court of Canada held that the Lord's Day Act did not offend the Canadian Bill of Rights, Mr. Justice Ritchie stated:[223]

> The constitutional protection of religious freedom terminated disabilities, it did not create new privileges, it gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma.

In Walter v. Attorney-General of Alberta, the Supreme Court of Canada upheld the validity of the Community Property Act, R.S.A. 1955, c.52.[224] This legislation regulated communal ownership of agricultural land by "colonies" and was designed to prohibit Hutterites from acquiring large sections of farming land.[225] In discussing freedom of religion, Mr. Justice Martland stated:[226]

> Religion as the subject-matter of legislation, wherever the jurisdiction may lie, must mean religion in the sense that it is generally understood in Canada. It involves matters of faith and worship, and freedom of religion involves freedom in connection with profession and dissemination of religious faith and exercise of religious worship. But it does not mean freedom from compliance with provincial laws relative to the matter of property holding.

Mr. Justice Martland, writing for the Supreme Court of Canada, held that living together communally and sharing land was not a part of religion, and thus property ownership could be validly regulated by the provincial legislature under the property and civil rights clause of the British North American Act, 1867.[227]

Similarly, in R v. Harrold, the British Columbia Court of Appeal upheld the validity of a municipal anti-noise by-law that curtailed street processions of members of the Hari Krishna by making illegal the setting off of fire crackers without a licence.[228] The Court held the by-law to be of general application and not aimed at restricting the religious freedom of the sect's members.[229]

Since the enactment of the Charter, the Supreme Court of Canada has provided guidance as to the meaning of s.2(a) in two decisions. In R v. Big M Drug Mart Ltd., the Supreme Court declared the federal Lord's Day Act to be of no force and effect because it infringed the Charter guarantee of freedom of religion.[230] In Edwards Books and Art Limited v. The Queen, the Supreme Court of Canada upheld the validity of the Retail Business Holidays Act R.S.O. 1980, c. 453 against a claim that it infringed s.2(a) of the Charter because it imposed a financial burden on non-Christian businesses that was not imposed on the majority of businesses.[231]

In R v. Big M Drug Mart Ltd., the main issue before the Supreme Court of Canada was whether the Lord's Day Act, violated s.2(a) of the Charter.[232] Section 4 of the Lord's Day Act made it unlawful, inter alia, for any person to sell, to carry on, or transact any business on the Lord's Day, a term defined to mean from midnight on Saturday to midnight on Sunday.[233] Big M Drug Mart Ltd. was charged with unlawfully carrying on the sale of goods on Sunday contrary to the Lord's Day Act.[234] As a principal part of its defence, the company challenged the validity of the Lord's Day Act, alleging that it violated s.2(a) of the Charter because it forced members of other religions to observe Sunday as a religious holiday.[235]

The Supreme Court of Canada, in a majority decision, held that the Lord's Day Act was of no force or effect because it violated the guarantee of freedom of conscience and religion found in the Charter.[236] The Chief Justice, writing for the majority, held that the Lord's Day Act was originally enacted to ensure Sunday observance as a religious day.[237] In his Lordship's view, the Lord's Day Act commanded a minority of the Canadian population, on pain of sanction, to conform to a particular religious precept of the majority.[238]

The Chief Justice further held that the legislation's original religious purpose was not mitigated by later secular justifications of it as a means of ensuring a regular day-off for workers.[239]

In the course of his decision the Chief Justice made the following remarks concerning the freedom of religion in Canada:[240]

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person choses, the right to declare religious beliefs openly and without fear of hinderance or reprisal, and the right to manifest belief by worship and practice or by teaching and dissemination. ...
>
> Freedom can primarily be characterised by the absence of coercion or constraint. If a person is compelled by the State or the will or another to a course of action or inaction which would not have otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. ... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit

> alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

In Edwards Books and Art Limited v. The Queen, the Supreme Court of Canada upheld the validity of the Retail Business Holidays Act, which required retail business to close on certain days including Sundays.[241] The legislation created a number of exceptions to the general prohibition. The most controversial of these exceptions was one applying to businesses that employed fewer than seven individuals and remained closed the Saturday immediately preceding the Sunday on which they opened.[242] Various companies were charged with operating on Sunday in defiance of the legislation.[243] As part of their defence, they challenged the validity of the Retail Business Holidays Act, alleging that it infringed s.2(a) of the Charter because it imposed a financial penalty on those shopowners and employees whose weekly religious day of rest was not Sunday.[244] In some cases, the individual shopowners were able to provide evidence of their religious beliefs and practices.[245]

The owners of the various businesses appealed their convictions to the Ontario Court of Appeal which, with the exception of one case, dismissed the appeals.[246] These decisions were then appealed to the Supreme Court of Canada.

The Supreme Court of Canada, in a majority judgment, held that the Retail Business Holidays Act infringed s.2(a) of the Charter but was demonstrably justified under s.1 of the Charter.[247] In reaching this conclusion, the Supreme Court reiterated many of the points made in Big M Drug Mart Ltd. and discussed more fully the concept of freedom of conscience and religion.

Chief Justice Dickson, writing for the majority, affirmed that both the purpose and effect of the impugned legislation was relevant to determining whether s.2(a) of the Charter had been infringed.[248] The Chief Justice accepted evidence presented by the Ontario Attorney-General that the purpose of the Retail Business Holiday Act was a secular one. It was designed to ensure that one section of the community, workers in the retail industry, had a weekly day of rest.[249] Although this weekly day of rest coincided with a Christian religious day, evidence showed that Sunday had been chosen because it was a commonly accepted day of rest in virtually all industry and had developed into a day when families could be together.[250] Because the Chief Justice found that the legislation was not designed to enforce compliance with a religious holiday, his Lordship then analysed the legislation's effect.

The Chief Justice stated that s.2(a) of the Charter prohibited the State from imposing costs or burdens that substantially interfered with religious practice or belief:[251]

> It matters not, I believe, whether a coercive burden is direct or indirect, intentional or unintentional, foreseeable or unforeseeable. All causes of burdens on the exercise of religious beliefs are potentially within the ambit of s.2(a).

The Chief Justice stressed, however, that not every state-imposed cost or burden would violate s.2(a) of the Charter.[252] In his Lordship's view, s.2(a) of the Charter protected individuals only to the extent that religious beliefs or conduct might reasonably or actually be threatened.[253] His Lordship stated that a state-imposed cost or burden must be capable of interfering with religious belief or practice before it could be said to violate s.2(a). Legislative or administrative actions which merely increased the cost of practising religious beliefs were not prohibited by s.2(a) if the burden or cost was trivial or insubstantial.[254]

In this instance, the Chief Justice found that the Retail Business Holidays Act created an economic advantage for those businessmen who observed Sunday as a religious day and disadvantaged those persons who observed another day.[255] For those businessmen who regularly observed Sunday as a day of rest for religious reasons, a state-imposed requirement that their business close on Sunday imposed no financial penalty because presumably the business would have been closed in any event. However, the Retail Business Holidays Act did impose a penalty on businessmen whose religious convictions required them to remain closed on a day rather than Sunday. In order to observe both the legislation and their religion, these individuals would have to close their shops for two days in the week.[256] The Chief Justice found that this constituted a substantial burden on their freedom of conscience and religion,[257] and that the Retail Business Holidays Act presumptively violated s.2(a) of the Charter.[258]

Notwithstanding this finding, the Chief Justice eventually held that the burden imposed by the Retail Business Holidays Act was justified under s.1 of the Charter.[259] Applying the tests summarised in R v. Oakes,[260] the Chief Justice found that the objective underlying the Retail Business Holidays Act was of sufficient importance to warrant overriding the rights granted under s.2(a) of the Charter.[261] His Lordship also found that the exemption scheme in the legislation represented a genuine attempt to minimize the effect of Sunday closing on Saturday-observing retailers, and was no more restrictive than alternative methods adopted by other provinces.[262]

5. Section 1

Section 1 of the Charter provides:

> 1. The Canadian Charter of Rights of Freedoms guarantees the rights and freedoms set out in it subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

This is the final section which must be considered when discussing the Charter's application to both exclusionary zoning and restrictions on the exercise of property rights. This section guarantees the various rights and freedoms found in the Charter; it also provides the basis for restricting those rights and freedoms in light of the rights of others and reasonable restraints imposed by society.[263]

The decisions of the Supreme Court of Canada in R v. Big M Drug Mart Ltd.[264] and R v. Oakes[265] outline the considerations to be taken into account when analysing legislation and government activity under s.1 of the Charter.

The task of determining whether the legislation meets the criteria of s.1 involves answering two questions:

1. Is the objective of the limits imposed by the legislation of sufficient importance to warrant

overriding a constitutionally protected right or freedom?

2. Are the means chosen reasonable and demonstrably justified?[266]

In R v. Oakes, Chief Justice Dickson elaborated the factors to be considered in answering these questions.[267] Regarding the first question, his Lordship stated that the objective served by the legislation must be of "sufficient importance" to warrant overriding a constitutionally guaranteed right or freedom[268] and must relate to concerns which are pressing and substantial.[269] His Lordship further stated that the courts would apply a high standard to ensure that trivial objectives, or ones discordant with principles of a free and democratic society, would not gain s.1 protection.[270]

When answering the second question, his Lordship stated the courts were to use a form of proportionality test, balancing the interests of society with those of individuals and groups.[271] According to his Lordship, this test is composed of three elements: the limitations created must be rationally connected to the objective; they must impair the right or freedom as little as possible; and there must be proportionality between the effect of the measures and the objective sought.[272] With respect to this last factor, his Lordship further stated that the severity of the effect on the individual's rights and freedoms might in some cases outweigh all other considerations so that the measure could not be justified by the objective sought.[273]

Madame Justice Wilson has expressed doubt whether utilitarian considerations and administrative convenience can constitute a sufficient justification for overriding Charter rights and freedoms.[274] In Edwards Books and Arts Limited v. The Queen, however, the Chief Justice indicated that administrative convenience was a legitimate concern in the case of legislation regulating business.[275]

Further, in Edwards Books and Arts Limited v. The Queen, both Chief Justice Dickson and Mr. Justice La Forest stressed that the Legislature must be given a certain latitude to formulate legislation.[276] In the words of the Chief Justice,[277]

> A reasonable limit is one which having regard to the principles enunciated in Oakes, it was reasonable for the legislature to impose. The courts are not called upon to substitute judicial opinions for legislative ones as to the place at which to draw a precise line.

Mr. Justice La Forest stated that the Legislature must be allowed adequate scope to achieve its objective if it is of a pressing and substantial nature.[278]

B. Specific Exclusionary Zoning Techniques

Of the exclusionary zoning techniques outlined in Chapter II, only single family zoning by-laws and discretionary development controls will likely be found to violate the Charter. Such devices have historically either been used to exclude, or have had the effect of excluding, specific groups such as the mentally and physically disabled or members of religious sects. Religion and mental and physical disability are now prohibited grounds of discrimination under s.15(1) of the Charter. As well, freedom of association, even in the narrow sense of Re Public Service Employee Relations Act, and liberty, in the expansive sense, are affected by these exclusionary zoning techniques. Prior to the enactment of the Charter, many courts had sought to mitigate the restrictive effects of such techniques by construing them in favour of the individual or groups challenging their validity. The presence of Charter-based rights and freedoms will simply strengthen this trend.

Subdivision exactions and by-laws regulating high density residential development are less likely to violate the Charter because they affect rights that, at present, seem only to be protected peripherally by the Charter. These exclusionary zoning techniques raise such issues as whether legislation having an adverse and disparate effect on the rights of certain groups violates s.15(1), whether s.15(1) prohibits wealth-based discrimination and whether s.7 of the Charter protects more than an individual's physical integrity and political freedoms.

1. Subdivision Exactions and Regulations excluding High Density Development

It is appropriate to discuss at one time the possible effect of the Charter on these two exclusionary zoning techniques because of their similarity. By-laws regulating or excluding high density residential development represent primarily an attempt by local planning authorities to protect low density residential areas from the detrimental effects of intensive development. As well, such policies are motivated by a desire to rationalise growth and tailor it to the fiscal resources of the community.[279] Likewise, subdivision exactions and development controls reflect concern that new development projects should provide or pay for the provision of municipal services they require. Local planning authorities also impose subdivision exactions in order to ensure that new residential development conforms to building codes, meets health and safety regulations, and is aesthetically compatible with the surrounding area.[280] These planning techniques create inequality because they effectively exclude the less wealthy from low density residential areas and new housing projects, thus denying them access to many associated benefits such as parks, adequate public transport, and schools. Since many of these benefits are the product of municipal and provincial public spending, it seems inequitable that some members of society are denied the opportunity to make use of them. These planning techniques at least arguably violate the individual's right to the equal protection and equal benefit of the law without discrimination.

Yet, a challenge to the validity of these exclusionary zoning techniques based on s.15(1) would likely fail. First, a person or group challenging the validity of subdivision exactions or large-lot zoning must establish a _prima facie_ breach of s.15(1). The previous discussion of s.15(1) shows how difficult it would be to establish such a breach.[281] Although the Supreme Court of Canada has stated that the effects of legislation are relevant insofar as s.2(a) of the Charter is concerned,[282] the Court may not extend an effects test to s.15(1). Rather, the Court may choose to adopt an approach favoured by some lower courts, namely that the phrase "without discrimination" connotes purposeful discrimination between groups of individuals as a result of personal characteristics associated with these individuals.[283]

Admittedly, the Supreme Court has chosen to adopt a test of disparate impact in reviewing actions alleged to violate the anti-discrimination provisions of the Canada Human Rights Act.[284] Like their American counterparts, however, they may distinguish between human rights legislation and a constitutional document.[285]

Equally important is the issue of whether s.15(1) protects individuals from inequality stemming from their socio-economic status. Certainly, the case of Kask v. Shimizu[286] suggests that s.15(1) will be violated if individuals are denied the opportunity to exercise Charter-guaranteed rights as a result of their comparative poverty. However, the right of access to housing is certainly not expressly guaranteed in the Charter. Whether it is impliedly guaranteed by s.7 is still to be determined. Statements by Chief Justice Dickson and Madame Justice Wilson suggest that certain members of the Supreme Court favour an expansive interpretation of s.7,[287] while statements by the members of the majority in Re Public Service Employee Relations Act suggest that other members of the Court favour a restrictive view of that Section.[288] Moreover, Mr. Justice MacDonald's decision in Kask v. Shimizu has not been universally accepted by other judges of the Alberta Court of Queens Bench.[289]

Yet, assuming that a breach of s.15(1) was established, it is possible that the inequality created by these exclusionary zoning techniques could be justified under s.1 of the Charter. Under s.1, a local planning authority would need to establish that the objectives of the planning techniques in question were of sufficient importance to warrant overriding the equality rights protected by s.15(1). The rationale of land use planning has traditionally been that it seeks to regulate land use so that a community's land and fiscal resources are used in the most efficient manner. Zoning to limit high density development in low density residential areas and a policy of imposing subdivision exactions on new housing projects are merely specific examples of this general underlying rationale.[290] Prior to the Charter's enactment, Canadian courts had accepted the importance of state regulation of land use; it is unlikely that they would now suddenly alter their position.[291]

Under s.1, a local planning authority must also establish that its land use regulations are both rationally related to its chosen objective and impair the individual's equality rights as little as possible. If the objective of the local planning authority is the legitimate one of regulating urban development, then by-laws restricting high density development and imposing subdivision exactions can be said to be rationally related to that goal. Whether they are the least restrictive means of doing so is more contentious since an answer to this question depends largely on the court's initial determination of the purpose of s.15(1). If s.15(1) is meant to provide a means of achieving equality of result, then a land use by-law or a policy of imposing subdivision exactions which effectively denies groups of individuals access to housing, schools, and parks is hardly the least restrictive means of regulating urban growth. If, as is likely, the courts determine that s.15(1) is not intended to achieve equality of result, then these planning techniques would probably meet the requirements of the second part of the test in R v. Oakes. By-laws regulating high-density development and subdivision exactions do not usually completely deny less wealthy persons all access to schools, public facilities, and parks. Rather, they merely deny these persons access to the same quality and quantity of facilities and open space.

2. By-laws defining "Family" and "Dwelling"

Zoning by-laws providing restrictive definitions of "family" and "dwelling" (single family zoning by-laws) are the exclusionary zoning techniques most likely to infringe the Charter. Depending on the way in which these by-laws are structured, and the circumstantial evidence surrounding their enactment or enforcement, they may offend either s.15(1), s.7 or s.2(a), and possibly even s.2(d) of the Charter.

As discussed previously in Chapter II, there are roughly three types of single family zoning by-laws that may offend the Charter: ones that describe occupancy in terms of "families" without defining this term; ones that define "family" or "a single house keeping unit" in terms of blood, marital or adoptive relationships; and ones that define these terms in a restrictive manner but permit a limited number of unrelated individuals to occupy a dwelling. The effect of these by-laws is to deprive people who wish to live in a non-traditional family setting the opportunity to live in many residential districts.

(a) Section 7

The most important section of the Charter for challenging the validity of single family zoning by-laws is s.7. Housing is recognised as a fundamental component of a person's economic well-being, and a state of economic well-being and financial security, it can be argued, is a prerequisite to full enjoyment of personal liberty.[292] The ability to choose one's living companion is also an important aspect of personal liberty. In some cases, individuals find they can only afford housing if they share living expenses. In other cases, the person's choice to share accommodation with other non-related individuals stems from religious belief, friendship, or sexual preference. For the mentally and physically disabled, the capacity to live together is considered critical to their ultimate ability to function in society.[293]

If the courts adopt an expansive interpretation of s.7, then all but those single family zoning by-laws describing occupancy in terms of "single house keeping units" would breach s.7. By-laws describing occupancy in terms of "families" (without further defining that term) imply by their very wording that only families in the traditional sense can live in areas zoned single family residential. By-laws defining "families" in terms of blood, marital, or adoptive ties quite obviously prohibit non-traditional families from living in single family residential areas. By-laws permitting unrelated individuals to live in single family residential areas but limiting their numbers would also constitute a breach of s.7. In effect, such by-laws state that a group of a specified number of individuals is permissibl while a group composed of even one additional member is not. Accordingly, these by-laws restrict the individual's freedom to join a non-traditional family when his presence would cause the group's numbers to exceed the specified limit.

(b) Section 2(d)

Section 2(d) of the Charter may also be applicable to some types of single family zoning by-laws, depending on which of the three judgements in Re Public Servants Employee Relations Act[294] becomes the dominant one.

If the interpretation of the three majority members of the Supreme Court becomes the dominant interpretation of s.2(d), then at least two types of single family zoning by-laws would probably withstand attack. The majority's interpretation of freedom of association is largely a political one - freedom of association protects the ability of the individual to join, participate in, and maintain an association. Single family zoning by-laws that do not define "family" would not impact upon this narrow concept of freedom of association because they do not stop individuals from joining together in non-traditional family groups. Such by-laws merely exclude these non-traditional families from living in given residential districts, and then only if the relevant local government body cares to enforce the terms of the by-law. Similarly, by-laws which restrict occupancy to blood, marital, and adoptive families do not preclude individuals from belonging to non-traditional families, although they do stop those families from living in certain areas. Under the majority's view of s.2(d) of the Charter, however, the activities of the association and the purposes for which it was formed are not protected by freedom of association. Thus, this type of by-law would not offend s.2(d) simply because it precludes a group of individuals from attaining the goal for which they originally formed a family.

By-laws allowing a limited number of unrelated individuals to occupy a dwelling may, however, infringe even this narrow concept of freedom of association because they limit the number of people who can join a non-traditional familial association. Such a restriction would seem to constitute a clear breach of the majority's concept of freedom of association, and must be justified under s.1 of the Charter.

Under Mr. Justice McIntyre's interpretation of freedom of association, the latter form of by-law would breach s.2(d), and for the same reasons. Mr. Justice McIntyre's interpretation of s.2(d) would also permit a group to challenge a by-law limiting occupancy to "families" on the basis that it denied them their individual rights to inhabit a home in a single family residential district. Under Mr. Justice McIntyre's formulation, freedom of association protects a group's activities to the extent that the individual members have a legal or Charter-based right to engage in that activity. If, under the relevant single family zoning by-law, the individual has the legal right to inhabit a dwelling, then he should be able to exercise that same right as a member of a group. Yet, if, for some reason, the by-law precluded individuals from living in the area, then the group would be unable to challenge the by-law on Charter principles. In such a case, however, it may be argued that the by-law is unreasonable, in the sense used by the Supreme Court of Canada in Bell v. Regina,[295] and that the individual does have the legal right to live in a single family residential district.

By-laws limiting occupancy to related families would still withstand attack. Here, the individual's right to associate with other unrelated individuals is not blocked: he and his chosen group are merely denied access to a residential area covered by this form of single family zoning by-law. According to Mr. Justice McIntyre, s.2(d) of the Charter would not protect the individual in this instance.

If the minority interpretation of s.2(d) of the Charter were to eventually become the accepted view of freedom of association, all forms of single family zoning by-laws would be subject to challenge. Those by-laws that would breach s.2(d) of the Charter under the views of the majority and Mr. Justice McIntyre would also breach the minority's view of freedom of association. Land use by-laws that would not breach the narrower concept of freedom of association would likely infringe the minority's view since this interpretation takes into account the goals and interests for which the association was formed.

(c) Section 2(a)

Section 2(a), freedom of religion, will be of limited assistance in challenging the validity of single family by-laws. In both R v. Big M. Drug Mart Ltd.[296] and Edwards Books and Arts Limited v. The Queen,[297] the Supreme Court of Canada stated that s.2(a) protected the freedom to engage in religious practices as well as the expression of religious belief.[298] However, the Court in R v. Big M. Drug Mart Ltd. also stated that the freedom to engage in religious practice was subject to such limitations as the state deems necessary to protect public safety, order, and health.[299] In Edwards Books and Arts Limited v. The Queen, the Court further stated that the alleged interference with religious practice must be substantial, and indicated that certain laws of general application, such as taxation statutes, would not be invalid simply because they imposed a tax burden on religious organisations or increased the price of items used in religious ceremonies.[300] Thus, in cases where alleged infringements of s.2(a) are raised, it is a matter for determination by a court whether the land use by-law substantially interferes with a group's religious practice. In the pre-Charter Hutterite cases where this issue has been raised the zoning by-laws have very clearly restricted a practice fundamental to this group's religion.[301] Similarly, s.2(a) would be infringed where a single family zoning by-law precludes members of a Christian religious order from living in a district. In both cases, communal living constitutes an integral part of religious life, and thus an argument based on s.2(a) is possible. Conversely, s.2(a) would not protect a group of individuals from the effects of a single family zoning by-law, if these individuals coincidentially were practising Christians. It is unlikely in such a case that their decision to live together would reflect religious belief.

(d) Section 15(1)

Finally, some single family zoning by-laws may violate s.15(1). As with all exclusionary zoning techniques, single family zoning by-laws divide a community along socio-economic lines simply because they exclude non-related extended families, which are generally composed of the poorer members of society and the mentally and physically disabled. The applicability of s.15(1) of the Charter to this aspect of single family zoning by-laws is subject to the courts' determination of the issues raised in connection with subdivision exactions and zoning to exclude high density residential development.

Unlike by-laws regulating high density residential development and subdivisions exactions, however, single family zoning by-laws also expressly create inequalities between members of families in the traditional sense and members of non-traditional families. Because such by-laws serve to exclude members of non-traditional families while simultaneously allowing members of traditional families access to single family residential areas, there is an inequality in the substance of single family zoning by-laws which _prima facie_ should constitute a breach of s.15(1). Moreover, single family zoning by-laws that place a limit on unrelated individuals but allow any number of related individuals to live in a single dwelling also _prima facie_ breach s.15(1). Clearly, these by-laws create a distinction between traditional and non-related families and do so solely on the basis of the lack of a familial tie between members of the unrelated family.

(e) Section 1

Justification of single family zoning by-laws is difficult. First, some of the motivations underlying single family zoning by-laws are questionable, especially when they are based on assumptions about the characteristics of non-traditional families. Second, even though other goals underlying this exclusionary zoning technique reflect valid planning considerations, it cannot be said that the means adopted by local planning authorities are rationally related to the desired goal, or affect the individual's rights in the least restrictive matter. By-laws defining occupancy in terms of "families" do not control the adverse effect of high density residential development.[302] It is also possible for families, large or small, to act as disruptive influences in the neighbourhood.[303] If a local planning authority wants to regulate growth in low-density residential areas, then by-laws describing occupancy in terms of single housekeeping units are a less restrictive means of doing so. Such by-laws do not reflect many of the assumptions underlying more restrictive single family zoning by-laws, but still serve the primary objective of excluding commercial development and boarding houses.

3. Controls on Discretionary Development

Controls on discretionary development potentially violate s.15(1) of the Charter. Discretionary development gives local planning authorities the opportunity to impose conditions on certain types of development that are not imposed on other forms of development. Such conditions can include the stricter application of building codes and health and safety regulations, the spacing of developments within a community, and the placing of a limit on the number of people who can live in such developments.[304] In residential areas, discretionary development control is most often exercised in connection with development applications for group homes.

The relevance of s.15(1) to discretionary development control depends, primarily, on whether the courts are prepared to view inequality in the treatment of types of development applications as inequality in the treatment of individuals. Discretionary development control creates different sets of procedural and substantive conditions based on the nature of the proposed development. In light of various lower court decisions, it is possible to argue that s.15(1) of the Charter does not grant developers, as sponsors of group housing, equality rights because such rights are economic in nature, while the Charter has been held to prohibit discrimination based on personal attributes only.[305] In the case of group housing, however, the characteristics of the individual inhabitants are closely connected with the form of residential development itself, and thus, procedural and substantive road blocks have the effect of excluding mentally and physically disabled from low-density residential areas. It is a debatable issue whether discretionary development control, in this instance, discriminates between types of development or types of persons.

If the courts were to determine that discretionary development control creates inequalities between individuals, rather than types of development, it would be much easier to argue that a local planning authority infringes s.15(1) of the Charter by imposing onerous conditions on the construction of group homes. This inequality can be viewed as an example of planning actions having an adverse and disparate impact on a class of individuals or as an example of an express inequality in the application and substance of land use regulations. In either event, there would be a prima facie breach of s.15(1), and consequently the local planning authority would have to justify its by-law or actions under s.1 of the Charter.

Discretionary development control as it relates to group housing presents complex issues under s.1 of the Charter. While few people would contest the benefits of allowing the mentally and physically disabled the opportunity to live a relatively normal existence in a residential area, local residents and councils do have important concerns about the effect such homes may have on their community. In many instances, Canadian municipalities have not sought to exclude totally group housing from residential areas, but have only sought to control the number of group homes in local areas and regulate the form such housing takes. Comments made by Chief Justice Dickson and Mr. Justice La Forest in Edwards Books and Arts Limited v. The Queen[306] suggest that Canadian courts would not seek to substitute a judicial policy relating to group homes for one developed by local planning authorities after consultation with planners, medical and other experts, and the community. Provided that the residents of group homes were given a certain degree of access to low density residential areas, the court may very well find that a land use by-law regulating development and limiting the number of group homes in a given area is justifiable under s.1 of the Charter.

However, the case may be different when a land use by-law makes no provision at all for group housing in a low density residential area. In this case, the mentally and physically disabled may be completely excluded from a low density residential area unless they can somehow fit within the confines of a single family zoning by-law.

Here, the courts may question the objective behind the land use by-law. Alternatively, they may find that the objective underlying the land use by-law is a substantial one, but then find that the form of by-law is not the least restrictive way of achieving the community's objective.

ENDNOTES

1 See Chapter VI n.212 ff.

2 *Re Singh and Minister of Employment and Immigration and six others* (1985) 17 D.L.R. (4th) 422 (S.C.C.), per Wilson at 458.

3 In *Re Public Service Employee Relations (Alta.); Labour Relations Act (Alta.) and Police Officers Collective Bargaining Act (Alta.)* (1987) 51 Alta. L.R. (2d) 97 (S.C.C.). Justices Le Dain, Beetz and La Forest held that s.2(d) of the Charter had a very narrow application, and protected simply the freedom to work for the establishment of an association, belong to that association, and participate in its activities.

4 *Re Singh and Minister of Employment and Immigration and six other appeals*, *supra* n.2, per Wilson, at 462-63; *R* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295, at 355-57 (1985) 18 C.C.C. 385, 18 D.L.R. (4th) 321, [1985] 3 W.W.R. 481, 37 Alta. L.R. (2d) 97,60 A.R. 161.

5 *Chicago B and Q.R. Co.* v. *Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897); *Webbs Fabulous Pharmacy Inc.* v. *Beckwith*, 449 U.S. 155, 101 S. Ct. 446, 66 L. Ed. 358 (1980).

6 *Minutes of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, v. 36, 14-18.

7 *Id*. at 14.

8 [1979] 1 S.C.R. 183, (1978) 92 D.L.R. (3d) 417 (S.C.C.).

9 Anne F. Bayefsky, "The Orientation of Section 15 of the Canadian Charter of Rights and Freedoms" in Joseph M. Weiller and Robin M. Elliott, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (1986) 105 at 112.

10 *Minutes of the Special Joint Committee*, v. 36, at 14.

11 *Id*.

11A The difference between equality of opportunity and equality of results is outlined by Bayefsky in "The

Orientation of Section 15 of the Canadian Charter of Rights and Freedoms: supra n.9 and "Defining Equality Rights, infra n.12. Briefly, equality of opportunity refers to the concept that all individuals, regardless of their status in life, should be free to pursue their own ends as far as they are able. However, because of inherent differences in individual capabilities, not every person will achieve an equal proportion of the benefits available in Canadian society. Equality of result refers to the concept that every individual, regardless of his inherent capabilities, should be entitled to and be able to obtain an equal distribution of benefits that Canadian society provides.

12 Anne F. Bayefsky, "The Orientation of Section 15 of the Canadian Charter of Rights and Freedoms" supra n.9 at 107-113; "Defining Equality Rights" in Anne F. Bayefsky and Mary Eberts, Equality Rights and the Charter of Rights and Freedoms (1985) 1-79.

13 Bayefsky, "The Orientation of Section 15 of the Canadian Charter of Rights and Freedoms," supra n.9 at 109.

14 Id. at 114.

15 Id. at 115. See also Marc Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982) 4 Supreme Court Law Review 131 at 142; William W. Black, "Intent or Effects: Section 15 of the Charter of Rights and Freedoms" in Weiller and Elliott, eds., supra n.9, 120 at 133.

16 Gold, "A Principal Approach to Equality Rights; A Preliminary Inquiry," supra n.15 at 156; Black, "Intent or Effects: Section 15 of the Charter of Rights and Freedoms," supra n.15 at 132.

17 Sources for the Interpretation of Equality Rights under the Charter: A Background Paper (January, 1985) 182.

18 Id. at 215-217.

19 Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry," supra n.15 at 156.

20 Black, "Intent or Effects: Section 15 of the Charter of Rights and Freedoms," supra n.15 at 132.

21 *R.* v. *Big M Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 347.

22 See *Re Andrews and the Law Society of British Columbia* (1986) 27 D.L.R. (4th) 600, [1986] 4 W.W.R. 242,2 B.C.L.R. (2d) 305; *Re Shewchuk and Richards; Attorney General of British Columbia, et al., Intervenars* (1986) 28 D.L.R. (4th) 429, [1986] 4 W.W.R. 289, 2 B.C.L.R. (2d) 324; *Re Cromer and B.C. Teachers' Federation, et al.* (1986) 29 D.L.R. (4th) 641, [1986] 5 W.W.R. 638, 4 B.C.L.R. (2d) 273; *Rebic* v. *Collver, Prov. J. (B.C.) and Attorney General of British Columbia* (1986) 28 C.C.C. (3d) 154, [1986] 4 W.W.R. 401, 2 B.C.L.R. (3d) 364; *Smith, Kline and French Laboratories Ltd. et al.* v. *Attorney General (Canada)* (1986) 12 C.P.R. (3d) 385 (Fed. C.A.); *Headley* v. *Public Service Commission Appeal Board (Can.)* (1987) 72 N.R. 185 (Fed. C.A.).

23 See Chapter II n.1-45.

24 See Chapter II n.17 ff.

25 This issue is discussed in Black, "Intent or Effects: Section 15 of the Charter of Rights and Freedoms," *supra* n.15 at 131-150.

26 Black, *supra* n.15 at 137.

27 See Chapter II n.1-45; n.65 ff.

28 [1985] 1 S.C.R. 295 at 333.

29 *Id*. at 360.

30 [1985] 2 S.C.R. 536 at 586, 547, 551.

31 *Id*. at 547.

32 *Washington* v. *Davis*, 426 U.S. 229 (1971); *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977), 97 S. Ct. 55 (1977).

33 429 U.S. 252 (1977), 97 S. Ct. 55 (1977).

34 429 U.S. 252 at 257-258.

35 *Id*. at 258.

36 *Id*.

37 *Id*. at 270.

38 426 U.S. 229 (1971).

39 429 U.S. 252 at 240.

40 Id. at 266-68.

41 Id. at 268.

42 Id. at 269-70.

43 Id. at 270.

44 Id. at 269.

45 442 U.S. 256 (1979) at 279.

46 Black, supra n.15 at 145-46.

47 Re Singh and Minister of Employment and Immigration and six other appeals (1985) 17 D.L.R. (4th) 422 (S.C.C.); R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295.

48 For an explanation of these three standards of scrutiny see Marc Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry," supra n.15 at 140-41; Laurence Tribe, American Constitutional Law (1978) at 1000-1025; 1082-97.

49 Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry," supra n.15 at 140; Tribe, American Constitutional Law, supra n.48 at 1098-1124.

50 Lindsey v. National Carbonic Gas Co., 220 US 61; 31 S. Ct. 337 (1911).

51 Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry," supra n.15 at 140.

52 W.S. Tarnapolsky, "The Equality Rights Provision" in Tarnapolsky and Beaudoin, eds., Canadian Charter of Rights and Freedoms - Commentary (1982) 395 at 403-407.

53 Black, "Intent or Effects: Section 15 of the Charter of Rights and Freedoms," supra n.15 at 141-43.

54 Id. at 142-3.

55 Id. at 137, 144-46.

55A Anne F. Bayefsky, "Defining Equality Rights", _supra_ n.12 at 14-25.

56 _Id_. at 146.

57 _Minutes of the Special Joint Hearings of the Senate and the House of Commons on the Canadian Constitution_, v. 41 at 18-23.

58 _Id_. at 18.

59 _Sources for the Interpretation of Equality Rights under the Charter: A Background Paper_, _supra_ n.17 at 197-98.

60 _Id_. at 199; 325-28.

61 _Id_. at 195-96; 328.

62 T.W. Wakeling and C.D. Chipeur, "An Analysis of Section 15 of the Charter After the First Two Years or How Section 15 Has Survived the Terrible Two's" (1987) 15 _Alta. L. Rev._ 407 at 430.

63 _Smith, Kline & French Laboratories Ltd. et al._ v. _Attorney-General of Canada_ (1986) 12 C.P.R. (3d) 385 (Fed. C.A.); _Kask_ v. _Shizimu_ (1986) 28 D.L.R. (4th) 64, [1986] 4 W.W.R. 154 (Alta. Q.B.).

64 (1986) 12 C.P.R. (3d) 385 (Fed. C.A.).

65 _Id_. at 387-88.

66 (1985) 7 C.P.R. (3d) 145, 19 C.R.R. 233.

67 (1985) 19 C.R.R. 233 at 281-286.

68 (1986) 12 C.P.R. (3d) 385 at 393.

69 _Id_. at 388-93.

70 _Id_. at 390.

71 _Id_. at 391.

72 _Id_.

73 _Id_. at 392.

74 _Id_.

75 _Id_.

76 *Id*. at 393.

77 *Id*.

78 (1986) 28 D.L.R. (4th) 64, [1986] 4 W.W.R. 154 (Alta. Q.B.).

79 (1986) 28 D.L.R. (4th) 64 at 66.

80 *Id*. at 72.

81 *Id*. at 79.

82 *Id*. at 80.

83 [1986] 1 S.C.R. 103, (1986) 26 D.L.R. (4th) 200, 24 C.C.C. (3d) 321.

84 [1985] 1 S.C.R. 292, (1985) 18 D.L.R. (4th) 321, 18 C.C.C. (3d) 385.

85 (1986) 28 D.L.R. (4th) 64 at 66.

86 [1986] 1 S.C.R. 103, (1986) 26 D.L.R. (4th) 200, 18 C.C.C. (3d) 321.

87 (1986) 28 D.L.R. (4th) 64 at 68.

88 *Id*. at 68.

89 *Id*. at 69.

90 *Id*. at 70.

91 *Id*.

92 *Id*. at 71-72

93 *Id*. at 72

94 *Id*.

95 (1987) 52 Alta. L.R. (2d) 62 at 70.

96 *Id*. at 68.

97 *Id*. at 69.

98 *Id*. at 70. In the later case of *R*. v. *Allen* (51 Alta. L.R. (2d) 248), Mr Justice Veit of the Alberta Court of Queen's Bench stated that Mr Justice MacDonald's decision in *Kask* v. *Shimizu* did not stand for the principle that impecuniosity is

an unexpressed but included distinguishing feature amongst individuals which must be eradicated, but rather it decided that the state must not establish standards of wealth to which persons must adhere before becoming entitled to fair and public hearings.

99 McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

100 Shapiro v. Thompson, 394 U.S. 618 (1969).

101 Griffin v. Illinois, 351 U.S. 12 (1956).

102 James v. Valtierra, 402 U.S. 137 (1971); Lindsey v. Normet, 405 U.S. 56 (1972); San Antonio Independent School District v. Rodriquez, 411 U.S. 1 (1973).

103 403 U.S. 137 (1971).

104 Id. at 137-38. Art XXXIV of the State Constitution required that a referendum take place prior to "any development composed by urban or rural dwelling units, apartments or other living accommodations for persons of low income." "Persons of low income" were those "persons or families who lack the amount of income which is necessary ... to enable them, without financial assistance, to live in decent, safe and sanitary dwellings without overcrowding."

105 Id. at 144.

106 393 U.S. 385 (1969).

107 403 U.S. 137 (1971) at 140-41.

108 Id. at 141.

109 Id. at 142.

110 Id. at 143.

111 405 U.S. 56 (1972).

112 Id. at 57-58.

113 Id. at 73.

114 Id.

115 Id. at 72.

116 *Id*.

117 *Id*. at 73.

118 *Id*. at 74.

119 *Id*.

120 411 U.S. 1 (1973).

121 *Id*. at 11.

122 *Id*. at 12-13.

123 *Id*. at 33.

124 *Id*. at 20,33.

125 351 U.S. 12 (1954).

126 372 U.S. 353 (1963).

127 411 U.S. 1 (1973) at 20.

128 *Id*. at 28.

129 *Id*.

130 *Id*. 20.

131 *Id*.

132 Gold, *supra* n.15 at 142-43.

133 *Id.* at 143-45.

134 Kenneth Pearlman, "The Closing Door: The Supreme Court and Residential Segregation" (1978) 44 *American Institute of Planners Journal* 160 at 164.

135 *Id*.

136 Authors arguing that s.15 does not grant corporations rights include P.W. Hogg, *The Constitutional Law of Canada* (2ed 1985) and Dale Gibson, *The Law of the Charter: General Principles* (1986). Authors advocating the contrary include T.W. Wakeling and C.D. Chipeur, "An Analysis of Section 15 of the Charter After The First/Two Years or How Section 15 Has Survived The Terrible Two's", *supra* n.62 and Eric Gertner, "Are Corporations Entitled to Equality: Some Preliminary Thoughts," 19 C.R.R. 288.

137 Hogg, *The Constitutional Law of Canada*, *supra* n.136 at 667; Gibson, *The Law of The Charter: General Principles*, *supra* n.136 at 85-86.

138 *Id*.

139 *R.* v. *Colgate Palmolive* (1971) 8 C.C.C. (2d) 40 (Ont. Co. Ct.).

140 *Smith, Kline & French Laboratories Ltd.* v. *Attorney General (Canada)* (1985) 7 C.P.R. (3d) 141, [1986] 1 F.C. 274; aff'd on this point (1986) 12 C.P.R. (3d) 385 (Fed. C.A.); *Aerlinte Eireann Teoranta* v. *Canada* (1987) 9 F.T.R. (Fed. Ct. T.D.); *K. Mart Canada Ltd.* v. *Millmink Developments Ltd*. (1986) 31 D.L.R. (4th) 583 (Ont. S.C.); *Aluminium Co. of Canada Limited* v. *The Queen* (1986) 29 D.L.R. (4th) 583 (Ont S.C.); *Milkboard* v. *Clearview Dairy Farm Inc.* (1987) 12 B.C.L.R. (2d) 116 (B.C.C.A.); *Mund* v. *Medicine Hat* (1985) 67 A.R. 11 (Q.B.); *Nissho Corporation* v. *Bank of British Columbia* unreported (May 14, 1987) No.8603-1287; *Kurolak* v. *Minister of Highways and Transportation* (1986) 28 D.L.R. (4th) 723 (Sask. Q.B.).

141 (1985) 18 D.L.R. (4th) 321.

142 *Id.* at 326.

143 *Id*. at 336.

144 *Id*. at 337.

145 Wakeling and Chipeur, "An Analysis of Section 15 of The Charter After the First/Two Years or How Section 15 Has Survived the Terrible Two's," *supra* n.62 at 432.

146 (1985) 7 C.P.R. (3d) 145, [1986] 1 F.C. 274 at 279.

147 *Id*.

148 *Id*.

149 *Id*. This same point is made by Eric Gertner, "Are Corporations Entitled to Equality?: Some Preliminary Thoughts" 19 C.R.R. 288 at 290.

150 D.C. MacDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources* (1982) 23-24; Patrice Garant, "Fundamental Freedoms and the Charter," in Tarnapolsky and Beaudoin, eds., *Canadian Charter of*

Rights and Freedoms - Commentary (1982) 257 at 270; Allan Gold, "The Legal Rights Provisions - A New Vision or Deja Vu" (1982) 4 Supreme Court Law Review 107 at 110.

151 Id.

152 Garant, "Fundamental Freedoms and The Charter," supra n.150 at 270.

153 Morris Manning, Q.C., Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982 (1984) para. 296; Paul Bender, "The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison" (1983) 28 McGill L.J. 811 at 845-46; T.J. Christian, "Section 7 of the Charter of Rights and Freedoms: Constraints on State Action" (1984) 22 Alta. L. Rev. 222 at 229-234; John D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983) 13 Man L.J. 455 at 474.

154 Whyte, "Fundamental Justice: The Scope and Application of Section 7 of The Charter," supra n.153 at 474-5.

155 See respectively: Shapiro v. Thompson, 394 U.S. 618 (1969); Griswold v. Conneticut, 311 U.S. 479 (1965); Roe v. Wade, 410 U.S. 11 (1972); Skinner v. Oklahama, 316 U.S. 535 (1942); Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973).

156 408 U.S. 564 (1972) at 571.

157 416 U.S. 1 (1974), 94 S.Ct. 1536 (1974).

158 416 U.S. 1 (1974) at 5-6.

159 Id. at 7.

160 Id.

161 413 U.S. 528 (1973) at 540-45.

162 416 U.S. 1 (1974) at 9. Mr Justice Douglas adopted a very wide view of the zoning power:

> A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs ... The police power is not confined to elimination of filth, stench and unhealthy places. It is

ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."

163 416 U.S. 1 (1974) at 15.

164 Id.

165 Id.

166 431 U.S. 493 (1976).

167 Id. at 496. Section 1341.08 (1966) Housing Code defined "family" as "a number of individuals related to the nominal head of the household or the spouse ... living as a single housekeeping unit in a single dwelling unit" but limited "individuals" to husband or wife, unmarried children with no dependants, father or mother, one dependant and one individual."

168 Id.

169 Id.

170 Id. at 498-99.

171 Id. at 498.

172 Id. at 499.

173 Id. at 500.

174 Id.

175 Id.

176 Id. at 504-5. In the subsequent case of Macon Association for Retarded Citizens v. Macon-Bibb County Planning and Zoning Commission, The Georgia Supreme Court, citing Belle Terre v. Boraas, declared that a zoning ordinance limiting occupancy of a single family dwelling to not more than four unrelated adults did not discriminate against the would-be residents of a group home. (252 Ga. 484, 314 S.E. 2d 218 (1984)). The United States Supreme Court dismissed an appeal from this decision for lack of a substantial federal question. (105 S.Ct. 57 (1984)). In City of Cleburne, Texas v. Cleburne Living Center, (105 S.Ct. 3249 (1985)), the United States Supreme Court reviewed the constitutionality of a municipal denial of a special use permit for a

proposed group home. The Court declared the municipal action unconstitutional because it stemmed from irrational fears of the effects of group homes and displayed prejudice against the mentally disabled. It thus denied the mentally retarded the equal protection of the law. The Court did not address the issue of whether the zoning by-law violated the Due Process Clause of the Fourteenth Amendment.

177 (1983) 45 A.R. 37 at 41-42..

178 (1984) 14 D.L.R. (4th) 151 at 181.

179 (1985) 7 C.P.R. (3d) 145, [1986] 1 F.C. 274, 19 C.R.R. 233 at 278.

180 [1983] 1 F.C. 745 at 752.

181 (1987) 12 B.C.L.R. (2d) 116 (B.C.C.A.) at 125.

182 (1986) 55 O.R. (2d) 522 at 530.

183 (1986) 72 N.B.R. (2d) 399 at 410 (N.B.Q.B.).

184 (1986) 32 D.L.R. (4th) 755 (Man. Q.B.) at 757.

185 (1985) 22 D.L.R. (4th) 520, [1986] W.W.R. 303, 36 Man. R. (2d) 81, 17 C.R.R. 132 at 141.

186 (1985) 30 M.P.L.R. 100 (Ont. Div. Ct.) at 110.

187 (1986) 24 C.R.R. 1 (Ont. Div. Ct.) at 8.

188 (1985) 19 C.R.R. 233 at 278.

189 (1986) 35 D.L.R. (4th) 1 at 54.

190 (1987) 51 Alta. L.R. (2d) 97 (S.C.C.) at 170.

191 Id. at 138.

192 [1985] 1 S.C.R. 177 at 205, 14 C.R.R. 13, 17 D.L.R. (4th) 422 at 458.

193 408 U.S. 564 (1972).

194 [1985] 17 D.L.R. (4th) 422 at 458-9.

195 Irwin Cotler, "Freedom of Assembly, Association, Conscience and Religion," in Tarnapolsky and Beaudoin, eds., Canadian Charter of Rights and Freedoms, supra n.52, 123 at 157.

196 [1987] 1 S.C.R. 313, (1987) C.L.L.C. 14,021,51 Alta. L.R. (2d) 97 (S.C.C.).

197 (1987) 51 Alta. L.R. (2d) 97 at 167-68, 177.

198 *Id*. at 167, 177.

199 *Id*. at 136.

200 *Id*. at 177.

201 *Id*.

202 *Id*.

203 *Id*.

204 *Id*. at 171.

205 *Id*. at 155, 158.

206 *Id*. at 159.

207 *Id*. at 160.

208 *Id*. at 167-68.

209 (1986) 27 D.L.R. (4th) 527 at 612.

210 (1987) 51 Alta. L.R. (2d) 97 at 165.

211 *Id*.

212 *Id*. at 134.

213 *Id*. at 135.

214 *Id*. at 137.

215 *Id*.

216 *Id*. at 165-166.

217 (1986) 27 D.L.R. (4th) 527 at 612.

218 (1987) 51 Alta L.R. (2d) 97 at 167.

219 *Id*. at 168.

220 William Black, "Religion and the Right of Equality," in Bayefsky and Eberts, eds., *Equality Rights and The Canadian Charter of Rights and Freedoms* (1985) 131 at 133-51; 158-60.

221 Id. at 140-46, 146-51.

222 See Chapter II n.142 ff.

223 [1963] S.C.R. 651 at 656.

224 [1969] 383, 66 W.W.R. 513.

225 66 W.W.R. 513 at 514-15.

226 66 W.W.R. 513 at 521.

227 Id. at 520-21.

228 (1971) 19 D.L.R. (3d) 471, 3 W.W.R. 365.

229 Id. at 479-80

230 [1985] 1 S.C.R. 295, (1985) 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, [1985] 3 W.W.R. 481, 37 Alta. R. (2d) 97, 60 A.R. 161, 58 N.R. 1, 13 C.R.R. 64, 85 C.L.L.C. Para 14,023.

231 (1986) 35 D.L.R. (4th) 1 at 52, (1986) 69 N.R. 241 (S.C.C.)

232 (1985) 18 D.L.R. (4th) 321 at 327.

233 Id.

234 Id. at 326.

235 (1983) 5 D.L.R. (4th) 121, [1984] 1 W.W.R. 625.

236 (1985) 18 D.L.R. (4th) 321 at 365.

237 Id. at 349.

238 Id. at 354.

239 Id. at 353.

240 Id. at 353-54.

241 (1986) 35 D.L.R. (4th) 1.

242 Id. at 11.

243 Id. at 11-13.

244 Id.

245 Id.

246 Id. at 18.

247 Id. at 56, 76.

248 Id. at 29.

249 Id. at 23-26.

250 Id. at 25-26.

251 Id. at 34.

252 Id.

253 Id.

254 Id.

255 Id. at 39.

256 Id.

257 Id.

258 Id. at 41.

259 Id. at 56.

260 [1986] 1 S.C.R. 103, (1986) 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200.

261 Id. at 43.

262 Id. at 51.

263 R. v. Oakes (1986) 26 D.L.R. (4th) 200 at 224; Dale Gibson, "Reasonable Limits Under The Charter of Rights and Freedoms" (1985) 15 Man. L.J. 27.

264 [1985] 1 S.C.R. 295

265 (1986) 26 D.L.R. (4th) 200.

266 Id. at 227.

267 Id.

268 Id.

269 Id.

270 *Id*. at 228.

271 *Id*.

272 *Id*.

273 *Id*.

274 *Re Singh and Minister of Employment and Immigration and six other appeals* (1985) 17 D.L.R. (4th) 422 at 468-9.

275 (1986) 35 D.L.R. (4th) 1 at 44.

276 *Id*. at 51, 75.

277 *Id*. at 51.

278 *Id*. at 69.

279 See Chapter II n.9 ff.

280 *Id*. n.29 ff.

281 *Supra* n.25 ff.

282 *R.* v. *Big M. Drug Mart Ltd.* [1985] 1 S.C.R. 295 at 360.

283 This approach is advocated in *Smith, Kline and French Laboratories Ltd.* v. *Attorney General of Canada* (1986) 12 C.P.R. (3d) 385 (Fed. C.A.).

284 *Canadian National Railway Co.* v. *Bhinder and Canadian Human Rights Commission* [1985] 2 S.C.R. 536.

285 The *Fair Housing Act* (Title VIII, Civil Rights Act, 42 USC s.3601-19(1970)) provides individuals with a right to challenge discriminatory housing policies which appear to create inequalities in housing "on account of race, colour, religion, sex or national origin." In *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d. 1283 (7th Cir. 1977), cert.denied 734 US 1025 (1978), the 7th Circuit Court, on remand from the Supreme Court, held that under the Fair Housing Act, the plaintiff need merely demonstrate a discriminatory effect; proof of a discriminatory intent was not necessary. Two later circuit decisions have adopted this policy (*see, Robinson* v. *Lofts Realty, Inc.*, 610 F. 2d. 1032 (2nd Cir. (1979); *Resident Advisory Board* v. *Rizzo*, 564 F.2d 126 (3rd Cir. (1979)). Two

other decisions have found violations of the Fair Housing Act, both on effects-based and intent-based tests. (See, U.S. v. City of Parma, 661 F.2d. 562 (6th Cir. 1981); U.S. v. City of Birmington, 538 F. Supp. 819 (Ed. Mich. 1982). While the Fair Housing Act normally applies only to racially discriminatory housing, recent decisions have recognised a link between economic and racial exclusion. In one decision, Angell v. Zinserr, 437 F. Supp. 488 (D. Conn.1979), an injunction was granted to white, low income residents of a community who had alleged that the community's policies deprived them of housing opportunities and of the opportunity to enjoy a racially integrated community.

286 (1986) 28 D.L.R. (4th) 64, [1986] 4 W.W.R. 154 (Alta. Q.B.)

287 See discussion infra n.191 ff.

288 See discussion infra n.189 ff.

289 See discussion infra n.95 ff.

290 See Chapter II n.1 ff.

291 See Chapter II n.163 ff and Chapter III n.177 ff.

292 See Chapter II n.18 ff.

293 See Chapter II n.75 ff.

294 (1987) 51 Alta. L.R. (2d) 97 (S.C.C.).

295 [1979] 2 S.C.R. 212, 98 D.L.R. (3d) 255, 9 M.P.L.R. 103, 26 N.R. 451.

296 (1985) 18 D.L.R. (4th) 321.

297 (1986) 35 D.L.R. (4th) 1.

298 (1985) 18 D.L.R. (4th) 321 at 354; (1986) 35 D.L.R. (4th) 1 at 34-35.

299 (1985) 18 D.L.R. (4th) 321 at 353.

300 (1986) 35 D.L.R. (4th) 1 at 34.

301 See Chapter II n.142 ff and 187 ff.

302 See Chapter II n.58 ff.

303 Id.

304 See Chapter II n.62 ff.

305 See discussion infra n.63 ff.

306 (1986) 26 D.L.R. (4th) 200.

CHAPTER VI: THE CHARTER, REGULATION OF PROPERTY RIGHTS AND SUBDIVISION EXACTIONS

This Chapter will examine the effect of ss.7 and 15(1) on the ability of municipal and provincial planning authorities to regulate property rights, require land owners to obtain subdivision approval before developing their land and impose conditions on that approval. It is evident that the majority of the provincial Courts believe that the Charter, as a whole, does not guarantee "economic rights", and that s.7, in particular, does not provide individuals or corporations with a general right of property. Moreover, the provincial Courts, by and large, have adopted the view that corporations cannot avail themselves of equality rights under s.15(1) and have suggested that economic grounds are not included within the prohibited grounds of discrimination listed in that Section.

The Supreme Court of Canada, however, has not ruled on any of these issues. Thus, it is still an open question whether the Charter can be used by individuals and corporations to challenge land use regulations affecting their property rights and making subdivision approval conditional upon provision of services, money and land.

A. Interpretive Problems Associated With The Charter

1. Section 7

There are three main interpretive problems associated with s.7. First, the courts must determine whether property rights are included in the concepts of "liberty" or "security of the person". Second, the courts must determine whether "the principles of fundamental justice" permit judicial review of the substance of legislation. Third, the courts must give some meaning to the word "deprived".

(a) Do property rights exist in s.7?

To date, the majority of provincial courts have held that property and economic rights are not included in s.7.[1] The Federal Court of Appeal and the Trial Division have adopted a similar position.[2] The exceptions to this trend are the decisions of Melvin v. The Queen in right of New Brunswick[3] and R. v. Halpert.[4]

The New Brunswick Provincial Court decision of Melvin v. The Queen in right of New Brunswick was the first Canadian judgment to raise the possibility of a judicially recognised general right of property.[5] In that case, provincial sales tax legislation allowed the provincial government to impose a lien on "all the property" of the taxpayer if that individual or corporation failed to pay the assessed taxes.[6] The provincial government imposed a lien upon the property of a restaurant owner, most of which was owned by third parties, such as Melvin, or held under lease, conditional sales contracts or licences.[7] Melvin, along with the other owners, argued as a matter of interpretation that the legislation did not grant the provincial government the power to place a lien on property belonging to third parties.[8] Mr. Justice Dickson of the New Brunswick Provincial Court agreed with this argument, holding that the wording of the legislation did not permit the interpretation advanced by the government.[9]

While his Lordship's judgment was based on a strict construction of the provincial legislation, it also suggested, in obiter, that the placing of a lien on the property of third parties contravened s.7 of the Charter. His Lordship stated that the right to the use and enjoyment of property and the right to claim compensation in the event that the Crown confiscated such property were common law rights existing at the time of the enactment of the Charter, and were thus given recognition under s.26.[10] Since the Charter purported to guarantee all the rights and freedoms to which Canadians had been accustomed, the right to the use and enjoyment of property was contained implicitly within the rights granted by s.7.[11] In his Lordship's opinion, the term "security of the person" extended to cover the right to the use and enjoyment of property and the right to be compensated if that property was confiscated by the Crown.[12]

Mr. Justice Dickson did not elaborate how property rights affected personal security nor indicate how the confiscation of property in this case would have affected the third party's personal security.

The Provincial Government appealed Mr. Justice Dickson's decision to the New Brunswick Court of Appeal. In the judgment reported as R. v. Eastabrooks Pontiac Buick Ltd. ("R. v. Eastabrooks"), the Court of Appeal upheld the lower court decision, but refused to go to the extent of holding that property rights were included in s.7 of the Charter.[13] Rather the Court of Appeal based its decision on common law rules of statutory interpretation.[14] Applying these rules, the Court of Appeal held that the sales tax legislation did not allow the Crown to place a lien on property belonging to third parties if the taxpayer had defaulted in his payments.[15] The Court of Appeal further stated that s.26 of the Charter did not give the common law rules of statutory interpretation constitutional status. Rather the Court held that this Section simply ensured the continuance of common law and statutory rights existing at the time of the Charter.[16]

In a second case, R. v. Halpert, the Ontario Provincial Court quashed informations charging the defendants with offences contrary to the Weights and Measures Act, 1970-71-72 (Can.) on the grounds that the relevant sections of the Act contravened s.7 of the Charter.[17] Sections 36(2) and 336(2) of the Regulations made it an offence to offer for retail sale, advertise or display gasoline in other than metric units. Section 19(3) of the Act empowered a government inspector to seal gasoline pumps where the inspector determined that the pumps did not meet the requirements of the Act and Regulations. Under ss.33 and 34 of the Act, the inspector could seal the pumps immediately if he determined that they were inaccurate, or place a compliance tag on them if they contravened the Act for other reasons.[18]

The defendants sold gasoline under the Imperial system as well as the metric system. An inspector sealed the pumps after placing a compliance tag on them. The defendants broke the seals and were charged with having contravened the Act and Regulations. Mr. Justice Ross of the Provincial Court held that s.33 and s.34 of the Act infringed s.7 of the Charter because they deprived the defendants of their property rights.[19] His Lordship further held that the infringement was not justified under s.1 because the inspector's power of determination was unfettered, there was no opportunity for a hearing, and the pumps could have been sealed for an indefinite time.[20] In his Lordship's opinion these factors made the sealing procedure manifestly unfair and untenable in a free and democratic society.[21]

In determining that s.7 of the Charter included a general right of property, his Lordship relied upon the definition of "liberty" found in Board of Regents State Colleges v. Roth.[22] This case, it will be remembered, gave an expansive definition to the word "liberty", including within it freedoms central to a person's enjoyment of his private life and his individuality.[23] Amongst the specific freedoms mentioned by the United States Supreme Court was the freedom to contract, although this freedom was linked with the individual's right to engage in the common occupations of life. His Lordship also linked property rights to the individual's ability to earn a livelihood, stressing the importance of the gasoline pumps to the defendants' businesses.[24]

The Crown appealed this decision. On appeal, the Ontario County Court set aside the orders of the lower Court, and ordered a new trial.[25] However, in overturning the earlier decision, the Court did not discuss the issue of whether s.7 included a right of property. Rather the Court assumed that the lower court judge was correct in stating that s.7 was applicable to the problem, but differed from him in his analysis of the effects of the Act and Regulations.[26]

In numerous other cases, the courts have stated that s.7 does not include either a general right of property or economic rights.[27] One reason frequently cited in support of this position is the legislative history of s.7.[28] It is well-known that the right to "use and enjoyment of property" was taken out of the final version of the Charter largely to appease the New Democratic Party, which feared that a property rights cause would threaten the validity of much federal and provincial regulatory legislation, and to placate some provincial governments, which argued that such a clause would strengthen the native people's land rights claims.[29] Some courts have taken judicial notice of the legislative history of s.7, and have held that the judiciary should not interpret s.7 as including a general right of property when the Parliament has deliberately excluded this right.[30]

A related reason for denying that s.7 includes property rights is based on a literal interpretation of the Charter.[31] Section 7 does not expressly mention property rights and speaks only of the right of life, liberty and security of the person. Some courts have placed significance on this point, comparing the Charter to both the Canadian Bill of Rights and the Fifth Amendment of the United States Constitution.[32]

A third approach adopted by some courts is to construe s.7 in light of the subsequent ss.8-14, holding that the general words of s.7 are limited by the detailed rights of those other sections.[33] Accordingly, these courts have found that concepts of life, liberty and security of the person refer only to the freedom from arbitrary arrest or detention, and to the bodily well-being of natural persons.[34]

The Supreme Court of Canada has not been faced with the issue of whether economic rights or a general right of property are included in the Charter. In Edwards and Arts Books Limited v. The Queen, Chief Justice Dickson, in obiter, stated that whatever else "liberty" included, it did not encompass the untramelled right to conduct one's business entirely free of state regulation.[35] In Re Public Service Employee Relations Act, Mr. Justice McIntyre stated that the Charter as a whole did not protect economic rights.[36] Yet, the Chief Justice and Madame Justice Wilson, in the same case, suggested that s.2(a) of the Charter protected the right of individuals to join together for the purpose of protecting their livelihoods, statements which suggest that the Charter protects some economic rights.[37] In Re Singh and the Minister for Immigration and Employment, some members of the Court favoured the definition of "liberty" found in the Regents of State Colleges v. Roth.[38]

Although the majority of Canadian courts have held that property rights are not included in s.7, the matter is still open to debate. It is true that the legislative history of s.7 suggests that Parliament did not intend for the Charter to protect property rights. Yet, the Supreme Court of Canada, in another context, has stated that the legislative history of the Charter should not determine its substantive content.[39] The narrow and literal approach that many courts have adopted to the interpretation of s.7 is also at odds with the approach advocated by the Supreme Court of Canada in R. v. Big M Drug Mart Ltd., where the Supreme Court stated that the Charter was to be given a broad and expansive interpretation.[40]

The approach adopted by the trial judges in Melvin v. R.[41] and R. v. Halpert[42] suggests that some members of the Canadian judiciary favour the incorporation of a general right of property into s.7 insofar as that right is associated with the individual's capacity to achieve a minimum level of economic well-being. This interpretation of s.7 is consistent with the statements made by Chief Justice Dickson in Edwards and Arts Books Limited v. The Queen and with the definition of "liberty" found in the

Regents of State Colleges v. Roth.

However, it would be difficult for Canadian courts to incorporate a right of property into s.7 without including the fundamental right of land ownership. This is true even if the Supreme Court of Canada decides that property and economic rights should be incorporated into s.7 on the grounds that they enhance the security of the person or provide the pre-conditions for the fuller enjoyment of personal liberty. The ownership of land is, in some cases, essential to the livelihood of the individual. Agricultural land is the most obvious example, but the same argument can be made for the individual who owns a commercial property in a city or town. Moreover, the ownership of residential land and housing is closely linked to the economic well-being of individuals and families. Home ownership also represents a significant investment for most Canadians, and one which historically has offered the promise of long-term financial security.

Nonetheless, incorporation of a general right of property into s.7 does raise the possibility that landowners with sizable investments in property will use the Charter to launch wholesale challenges to planning legislation. Since corporations can also enjoy the rights granted by s.7,[43] it is likely that development companies will seek to overturn planning decisions and other regulatory actions that reduce their development choices and impose costly subdivision conditions in exchange for a development permission. This, in turn could lead to eventual stagnation in the planning field as local and provincial planning authorities find their more innovative measures challenged in the courts.

As an alternative, the courts may choose to develop a constitutionally protected right of property while, at the same time, recognising that some forms of property rights may be subject to a greater range of limitations. Admittedly, a hierarchy of property rights would reflect the courts' own assessment of the comparative value of such rights. However, as recent decisions in the planning field indicate, the Supreme Court of Canada has already acknowledged that the status of private property rights has been modified in twentieth-century North American society.[44] American courts have arrived at a similar conclusion, notwithstanding the existence of a constitutionally guaranteed right of property ownership.[45] While the Fifth and Fourteenth Amendments continue to protect the rights of property owners, public regulatory bodies still possess the ability to place significant restrictions on the exercise of private property rights.

(b) The meaning of "deprived"

One of the methods by which the courts could modify the force of a property rights provision in the Charter is to restrict its application to situations where the individual has been "deprived" of his property. The word "deprived" has been defined in the Oxford English Dictionary as "dispossessed" or "divested".[46] Webster's Dictionary defines the verb "to deprive" as "to divest of something possessed or enjoyed".[47] In Black's Law Dictionary, the word "dispossession" is defined as "the act of ousting or removing one from the possession of property".[48] "Possession", in turn, means "the condition or state of facts under which one can exercise his power over a corporate thing at his pleasure to the exclusion of all others".[49] Thus, "deprived" comprises the actual physical transfer of title or the destruction of a possessory interest in property. In the strictest sense, an individual can only be deprived of a property right when this right is expropriated by a government entity or government regulation causes a de facto transfer of the benefit of that right to the government entity.[50]

In four cases, Commonwealth courts have discussed the issue of whether regulatory actions can ever deprive the individual of his property rights.[51] The first case is Belfast Corporation v. O.D. Cars Ltd.[52] There, the

Government of Northern Ireland enacted the Planning (Interim Development) Act, 1941 whereby owners of property were required to obtain a development permit prior to altering their buildings. Anyone denied a development permit was entitled to claim compensation to the extent permissible under the Planning Act 1931. Section 10(2) of this latter Act deemed property not to have been injuriously affected by legislation regulating of the construction or maintenance of property or buildings.[53] O.D. Cars Ltd., which had been denied a development permit, alleged that the two pieces of legislation, in combination, deprived the company of its property without compensation.[54] Section 5(1) of the Government of Ireland Act, 1920 provided, inter alia, that property could not be taken directly or indirectly without the payment of compensation.[55]

The House of Lords found that O.D. Cars Ltd. had not been deprived of its property by the local council's refusal to issue a development permit.[56] Viscount Simonds, writing the majority judgment, distinguished between the regulation of one of the elements of property, namely the right to the use and enjoyment of the property, and the transfer of possession of property in its entirety.[57] His Lordship held that only the latter situation represented a compensable taking of property under the Government of Ireland Act. In his Lordship's opinion, the council's refusal to issue a development permit did not effect a transfer of property to the state, and, hence, was not compensable under s.5(1) of the Government of Ireland Act.[58]

Lord Radcliffe, in a concurring judgment, also held that the regulation of property by a development permit system did not constitute a taking of property.[59] However, his Lordship acknowledged that, in theory, the regulation of property could create a taking of property if that regulation was excessive,[60] but chose not to elaborate on this statement because such a situation was not before him.[61]

In Manitoba Fisheries Ltd. v. The Queen, the Supreme Court of Canada found that the Freshwater Fish Marketing Act, R.S.C. 1970, c. F-13 confiscated the goodwill of the appellant's business.[62] As the Act did not expressly exclude a right of compensation, the Supreme Court of Canada applied the common law presumption that Parliament does not intend to take private property without compensation and awarded the appellant damages.[63]

The Act gave the Freshwater Fish Marketing Corporation an exclusive licence to operate a fish exporting business from the Province of Manitoba.[64] All private firms were prohibited from conducting a similar export business unless granted a licence by the Corporation or given an exemption by the Federal Cabinet.[65] The Act further empowered the responsible Federal Minister to enter into an agreement with the Government of Manitoba for the payment of compensation to owners of plants and equipment rendered redundant by the Act. The Government of Manitoba subsequently refused to make any compensatory payments to the appellant.[66]

The appellant had operated one of a number of fish processing businesses which supplied purchasers with freshwater fish from Manitoba. The Corporation which replaced these businesses continued to process, package, and sell fish using substantially the same methods established by the private firms.[67] Most importantly, the customers of the private firms, including those of the appellant, became the Corporation's customers. Sales to those customers formed all or substantially all of the Corporation's trade for the first year of its operation.[68]

The appellant contended that the Act deprived it of its goodwill and that the Federal Government should compensate it for its loss.[69] The Trial Division of the Federal Court, and subsequently the Federal Court of Appeal, held that the Crown, by its agent Corporation, had not "taken" the appellant's goodwill. Consequently, the appellant was not entitled to compensation.[70]

The Supreme Court of Canada found that the passage of the Act, the creation of the Corporation, and the granting of a statutory monopoly had destroyed the goodwill of the appellant's business.[71] The Court also held that this goodwill constituted property, and that the Corporation had acquired it by statutory compulsion.[72] Stating that the Act did not provide for the taking of property without compensation, the Supreme Court held that the appellant was entitled to receive compensation for the loss of its goodwill.[73]

In arriving at its conclusion, the Supreme Court of Canada discussed an earlier decision in which the Irish High Court had been asked to determine whether legislation, or action taken under it, constituted a taking of property. In Ulster Transport Authority v. James Brown & Sons Ltd., the Irish High Court found that certain provisions of the Transport Act (Northern Ireland), 1948 took the defendant company's business.[74] The Transport Act effectively put the company out of business by repealing a previous exemption allowing the company and others to compete with the government agency in furniture moving.[75] During the course of its judgment, the Irish High Court distinguished between a "mere prohibition" or a "prohibition regulatory in character" and legislative action intended to "capture" the defendant's business for the benefit of the government agency.[76] The latter action alone constituted a taking of property compensable under Irish law.[77] The Supreme Court of Canada considered that this case gave strong support to Manitoba Fisheries Ltd.'s claim, and in the result, adopted a similar analysis of Manitoba Fisheries Ltd.'s position under the Freshwater Fish Marketing Act.

The final case to discuss the distinction between legislation regulating property rights and legislation "taking" property rights is the unreported decision of Reinhold Trelenberg v. The Minister for the Environment (Alberta).[78] In that case, the Alberta Court of Queen's Bench held that the Minister of the Environment had not violated the plaintiff's right not to be deprived of his property without due process of law by placing the plaintiff's land in a Restricted Development Area.[79] In arriving at this conclusion, the Court drew a distinction between regulations which deprive the individual of the full enjoyment of his property rights and those which cause a de facto expropriation,[80] citing the following passage from 10 Halsbury (3d) in support of that distinction.[81]

> The right to compensation can only arise (if it does arise) where the subject's property is actually taken possession of, or used by, the government, or where by order of a competent

> authority, it is placed at the disposal of the government. A mere negative prohibition, although it involves interference with the enjoyment of property, does not, merely because it is obeyed, carry with it at common law, any right of compensation.

These decisions adopt a very restricted interpretation of the concept of "taking". In order for legislation or regulatory action to constitute a taking it must do one of two things. The legislation or regulatory action must transfer title or possession of an asset from the individual to the Crown or one of its agencies. Alternatively, as in the case of Manitoba Fisheries Ltd. v. The Queen, it may destroy the value of an asset held privately in order that the Crown or its agencies benefit. In either case, there is a transfer of property or the benefit of a property right from the subject to the Crown.

The type of legislation discussed in Manitoba Fisheries Ltd. v. The Queen and Ulster Transport Authority v. James Brown & Sons Ltd. may be contrasted with the majority of land use planning devices. While many land use regulations freeze the individual's property rights, few actually transfer the benefit of private property rights to a public regulatory body or government agency. In general, the benefits of land use regulations are enjoyed indirectly by a diverse and widespread community. Thus, if the distinction between "mere regulation" and a "taking" is maintained under the Charter, few planning devices would violate s.7.

Under the Fifth and Fourteenth Amendments of the United States Constitution, a similar distinction to that between "mere regulation" and "taking" has developed. The enterprise-arbitration theory, first proposed by Professor Joseph Sax, attempts to distinguish between activities carried out by a government agency in its "enterprise" capacity and regulations formed pursuant to its "arbitral" capacity.[82] This test has recently been restated by Professor William Stoebuck.[83] Professor Stoebuck makes a distinction between the state's power of eminent domain and its inherent regulatory power.[84] The state exercises its eminent domain power for the public use, and its exercise entails the transfer of title or possession or the benefits accompanying title or possession from the private individual to the state. A landowner's property rights are diminished and the government's property interest is correspondingly increased whenever the state exercises its powers of eminent domain. Only when an exercise of the state's regulatory powers accomplishes the same results, does a "taking" of property occur.[85]

Although the Supreme Court of the United States has not decided a land use planning case solely on this theory, it has invoked the enterprise-arbitration distinction in cases of flood control and airport zoning.[86] In the recent decision of Penn Central Transportation Co. v. New York City, the United States Supreme Court indicated that the enterprise-arbitration distinction constituted the initial meanings of separating a lawful use of the regulatory power from an unlawful one.[87] Two State court decisions, one concerning landmark dedication and the other concerning wetlands regulation have also relied upon this distinction.[88]

The American courts, however, have also held that it is possible for land use regulations to "take" property without necessarily transferring it to a public regulatory body. The American courts first stated that excessively restrictive land use regulations could constitute a "taking" of property in the case of Pennsylvania Coal Co. v. Mahon.[89] In that case, the Kohler Act, 1921, P.L. 1198, prohibited mining in areas likely to subside and cause damage to homes and buildings. The Pennsylvania Coal Co. had deeded land to Mahon, but expressly reserved the right to mine under the land surface. Mahon, in the deed, assumed the risk of any resulting damage.[90] The Kohler Act was passed after the Company transferred the land to Mahon.[91] Mahon sued to enjoin the Company from mining in the area and the Company defended the action partly on the basis that the Kohler

Act violated the Fifth and Fourteenth Amendments.[92]

Mr. Justice Holmes, writing the majority judgment of the Supreme Court, held that the Kohler Act was invalid because it had not been enacted for a public purpose.[93] However, the Justice then discussed the validity of the Kohler Act on the assumption that it had been properly enacted for a public purpose. The Justice noted that the Kohler Act made mining commercially impractical and virtually appropriated the Company's mining rights. Since, in American law, the appropriation of property to the State was an element in the eminent domain power, the State's action in passing the Kohler Act were potentially compensable under the Fifth Amendment.[94] Mr. Justice Holmes then stated, in dicta, that it was possible for a regulation to "go too far" and constitute a "taking" of property.[95] The factors that Mr. Justice Holmes considered indicative of the over-regulation of property were: a substantial diminution in the value of the property, the appropriation of valuable mining rights to the state, and the lack of "an average reciprocity of advantage" between the detriment suffered by the Company and the benefit gained by the public.[96]

The "taking" doctrine initially had little impact on land use planning, a fact demonstrated by the landmark decision of Village of Euclid v. Ambler Realty Co.[97] In

Euclid v. Ambler Realty Co., the United States Supreme Court held that a local ordinance downzoning land from an industrial designation to residential/commercial did not violate the Fifth and Fourteenth Amendments.[98] In this case, the first major case to uphold the validity of zoning ordinances in the United States, the Village of Euclid enacted a comprehensive zoning ordinance variously classifying portions of the sixty-eight acre block of land owned by Ambler Realty Co.[99] The Company had planned to sell the block for industrial development, but this use was proscribed by the new ordinance.[100] The Company sought a declaration that the ordinance was invalid because, inter alia, it was arbitrary and unreasonable and confiscated the Company's property. The Company alleged, in argument, that the market value of its land had fallen from $10,000/acre to $2,500/acre as a result of the residential/commercial zoning.[101]

The United States Supreme Court upheld the validity of the zoning ordinance.[102] The Court stated that in order for a zoning ordinance to violate the United States Bill of Rights it must be clearly arbitrary and unreasonable and have no substantial relation to public health, safety, morals, or the general welfare of the community.[103] Earlier in its decision, the Court had noted that zoning ordinances had been developed in response to the complexities of urban growth,[104] and that regulations previously thought arbitrary and oppressive were now accepted as a necessary means of regulating growth.[105] The Court thus found that the ordinance fell within the state's police power.[106] The Court did not mention the "taking" doctrine developed in the earlier decision of Pennsylvania Coal Co. v. Mahon.

Approximately fifty years later, the United States Supreme Court again considered the "taking" doctrine in the context of land use planning. In its decision of Penn Central Transportation Co. v. New York City, the Court upheld the validity of historic landmark legislation.[107] Under New York City's landmark preservation ordinance, buildings deemed to be of historic and architectural significance could be designated as landmarks. The owner, in order to alter the facade of the building, had to obtain written permission from the Designation Committee. Compensation was provided to the owner in the form of transfer development rights.[108] Penn Central, the owners of the Grand Central Station, applied for permission to construct an office tower on top of the Station. The Designation Committee denied their application.[109]

Penn Central decided not to pursue its administrative law remedies but, rather, elected to challenge the constitutional of the landmark ordinance. The Company alleged three grounds of invalidity: the legislation had effected a total confiscation of their air rights; the City had acted in its enterprise capacity; and the law was arbitrary because it disproportionately affected the landowner whose property was designated.[110]

Prior to deciding upon the specific arguments raised by Penn Central, the United States Supreme Court chose to review the "taking" doctrine as it had developed since the decision of Pennsylvania Coal Co. v. Mahon. The Supreme Court reaffirmed that an otherwise valid exercise of the state's regulatory power could go "too far" and constitute a "taking" of property rights.[111] The Court offered two guidelines for determining the point at which the state could be said to have exceeded its regulatory power. The first issue to be addressed was whether the state had acted in its enterprise or arbitral capacity, or whether it had physically invaded private property.[112] The second was whether the regulatory measure had significantly affected "investment-backed expectations".[113] Although the Supreme Court did not define this latter concept any further, it did reiterate that severe economic loss was not sufficient proof that investment-backed expectations had been affected.[114]

Penn Central was denied relief under the Fifth and Fourteenth Amendments of the United States Constitution.[115] The Supreme Court held that New York

City, in refusing to permit the development of Grand Central Station, had not acted in its enterprise capacity because historic landmark legislation was a lawful extension of the state's power to regulate the use of land.[116] In addition, the Court held that the landmark legislation applied to all owners of historic buildings and provided the landowner with reciprocal benefits such as planned urban growth and the conservation of historically and architecturally significant buildings.[117] Further, the Court held that the legislation was indiscriminate and did not isolate a few individuals to bear the economic burden of historic designation.[118] The Court also stated that Penn Central's "investment-backed expectations" had not been disrupted because it was still free to apply for permission to construct a smaller tower.[119] In the opinion of the Court, Penn Central's primary development expectations had remained intact, and only the Company's potential profit had decreased.[120]

The decision in Penn Central Transportation Co. v. New York City remains the most recent and comprehensive Supreme Court analysis of the "taking" doctrine. Yet, the major point to be drawn from the case is the Court's decision to abandon the attempt to formulate a general method of determining the validity of regulatory takings. Rather, the Court adopted the position that the analysis should proceed on an ad hoc basis, with American courts examining each case in light of a myriad of tests.[121] The Supreme Court held that the enterprise-arbitration distinction and the "too far" test of Pennsylvania Coal Co. v. Mahon were both legitimate means of determining whether the regulation of land use constituted a taking.[122] Similarly, the Court indicated its support for older tests based upon physical invasion of property and the distinction between the regulation of a harmful use of the individual's property rights and the creation of a public benefit.[123] The eclectic nature of the "taking" doctrine has recently been underscored in the Florida Supreme Court decision of Graham v. Estuary Properties Inc., in which the Court listed six factors indicating whether the regulation of land use constituted a "taking" of the property.[124]

A second aspect of the Penn Central decision is the emphasis the United States Supreme Court placed on "justice and fairness" and "investment-backed expectations".[125] These terms are borrowed from Professor Frank Michelman's article, "Property Utility and Fairness: Comment on the Ethical Foundations of 'Just Compensation' Law".[126] In that article, Professor Michelman attempted to determine the ethical basis of the compensation requirement in the Fifth Amendment of the United States Bill of Rights. One of the ethical systems which Professor Michelman used to examine the question of why people believe that certain state actions require the payment of compensation was the concept of justice developed by John Rawls.[127] Professor Michelman modified Rawl's writing, hypothesising that compensation was required whenever the individual, viewing events objectively and in the long term, no longer felt that his personal sacrifice was balanced by an increase in the general welfare in which he would eventually partake or by the possibility that some future, unspecified gain would accrue to himself.[128] In the context of land use planning, this point was marked when the state imposed a unique burden or loss on an individual which disrupted his "distinct, sharply crystallised investment-backed expectations" that a given land use regulation would eventually bring a benefit to him.[129] Professor Michelman stressed that a severe economic effect by itself did not indicate the critical point where an individual must be compensated for regulatory action.[130]

In Kaiser Aetna v. The United States, the United States Supreme Court relied upon the concept of investment-backed expectations when it declared unconstitutional a "navigational servitude".[131] Kaiser Aetna owned and leased land that included a shallow lagoon on the island of Oahu. The Company expended considerable funds in order to convert the lagoon into a marina and to connect the lagoon to a nearby bay. The Company had been informed by the Army Corps of Engineers that it did not require permits for the development and operation of the marina. Based upon this assurance, the Company spent more money in order to widen the access from the bay to the marina. The Army Corps, pursuant to s.10 of the Rivers and Harbours Appropriation Act, 33 U.S. c.403, then requested that Kaiser Aetna provide public access to the bay via the waterway it had constructed.[132]

The Supreme Court held that the Army Corp of Engineers was bound to exercise its power of eminent domain and provide compensation to Kaiser Aetna if it wished to use the Company's waterway for the public.[133] The Supreme Court stressed that Kaiser Aetna had expended considerable sums on the improvement on the assumption that the waterway was privately owned,[133] and had been receiving fees and security payments from its tenants who might not continue to rent space at the marina if the waterway was devoted to public use.[134] Finally, the Supreme Court made a further distinction between a "mere economic advantage", the loss of which was non-compensable, and an economic advantage backed by a legal regime, the loss of which was compensable.[135] The Supreme Court pointed to actions by the Army Corps that had lead Kaiser Aetna to believe that its investments in the marina and waterway would ultimately generate profit for itself.[136] In the opinion of the Court, the representations by the government officials transformed Kaiser Aetna's "mere economic advantage" to an advantage that was backed by the force of law.[137]

The Kaiser Aetna case should be contrasted with two other decisions, one from the United States Supreme Court and the other from the California Court of Appeal, which have found that downzoning and holding zones do not disrupt investment-backed expectations, but provide the affected landowner with a reciprocity of advantage.[138] The first of these cases, H.F.H. Ltd. v. Superior Court of Los Angeles, concerned the downzoning of land.[139] A development company had acquired land originally zoned for agricultural use and subsequently obtained a rezoning of that land to a commercial classification. Notwithstanding the rezoning, the company did not develop this property.[140] The local Council then redesignated the land as neighbourhood/commercial and low density residential. As a consequence of the redesignation, the land's value fell from $400,000 to $75,000.[141] The California Court of Appeal upheld the constitutional validity of the downzoning, citing Euclid v. Ambler Realty Co.[142] as a precedent for the constitutional validity of downzoning ordinances.[143] The Court stated that some degree of uncompensated loss had to be borne by the individual landowner as an inevitable accompaniment to modern land use regulation.[144] The Court also doubted whether the company had, in fact, suffered an economic loss since the land's original price reflected the uncertainty of a favourable rezoning.[145]

In Agins v. Tiburon, the Supreme Court of the United States discussed the constitutional validity of downzoning for the first time since its decision in Euclid v. Ambler Realty Co.[146] Agins had purchased land in a desirable residential location for the purpose of developing small lot suburban homes. The City of Tiburin, concerned that excessive development would cause further soil erosion and destroy the natural beauty of the surrounding hills, enacted a zoning ordinance under which Agins was permitted to develop five single family homes on one 5-acre tract of land.[147] Agins challenged the validity of the zoning ordinance, alleging that it constituted an uncompensated taking of property.[148]

The Supreme Court of the United States upheld the validity of the ordinance because of the particular circumstances of the case.[149] However, the Court's analysis clearly shows that a land use regulation under some circumstances may so inhibit the use of land as to constitute a taking of property. Summarising its position, the Court stated that "the application of a general law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ... or denies an owner the economically viable use of his land."[150]

In the present case, the Supreme Court found that the zoning ordinance did advance a legitimate state interest since it was intended to protect the city's residents from "the ill effects of urbanisation".[151] The Court also held that a "reciprocity of advantage" existed between Agins and the community since Agins benefited from the creation of orderly urban growth and the availability of open space.[152] Moreover, Agins was not the only person unable to develop his holdings; all landowners in the vicinity, whether they had developed their land or not, shared the burden of the same restrictions.[153] In connection with this latter point, the Supreme Court noted that Agins was still able to to develop his property for homes on one block of land.[154] At the beginning of its judgment, the Supreme Court had stated that the "taking question" was, in essence a determination that the public at large, rather than the individual landowner must bear the burden of an exercise of the state regulatory power in the public interest.[155] To the Supreme Court, justness and fairness, in this case, did not dictate that Agins be permitted to develop his land in a manner potentially damaging to the city's environment.[156]

Although the American courts have stated land use regulations can go "too far" and "take" privately owned property, the recent decisions of the United States Supreme Court illustrate how difficult it is for an individual to establish that a specific zoning ordinance violates the United States Constitution. Generally the courts have stated that severe economic loss is not sufficient proof that a given zoning ordinance or planning decision constitutes a "taking",[157] and have frequently found that the landowner retains some residual use of his property.[158] They have also held that landowners, regardless of whether they are persons or corporations, benefit in the long-term from planned urban growth.[159] Finally, few courts will find that the landowner is the sole person or corporation affected by the land use regulation in question. Rather, recent decisions show that the courts are inclined to find a land use regulation theoretically affects all landowners in the area and not just the landowner whose property rights are immediately restricted.[160]

(c) The "principles of fundamental justice"

The final issue arising in connection with interpretation of s.7 is the meaning of the phrase "the principles of fundamental justice". While this phrase was intended by the drafters of the Charter to provide only procedural protection to individuals and companies, the Supreme Court of Canada has recently held that it has a substantive content as well.[161] Judicial recognition of a substantive element in "the principles of fundamental justice" raises the possibility that Canadian courts will declare unconstitutional legislation and regulatory actions perceived as substantively unfair and unjust.[162] If a general right of property was included in s.7 of the Charter, an interpretation of fundamental justice that introduced a substantive element could lead to a wholesale review of planning legislation. For one of the central issues of state regulation of property rights is whether regulation that discriminates amongst landowners on the basis of the location of their property and imposes substantial economic loss on particular individuals is fair and just.[163]

The leading decision on the interpretation of "the principles of fundamental justice" is Reference Section 94(2) of the Motor Vehicle Act[164] ("Ref. s.94(2)"). In that case, the Supreme Court of Canada declared that s.94(2) of the Motor Vehicle Act, R.S.B.C. 1979, c.288, which made it an absolute liability offence to drive a vehicle while one's licence was suspended, was inconsistent with s.7 of the Charter.[165] Sections 94(1) and (2) of the Motor Vehicle Act read:

> 94(1) A person who drives a motor vehicle on a highway or industrial road while
>
> (a) he is prohibited from driving a motor vehicle under section 90, 91, 92 or 92.1, or
>
> (b) his driver's licence or his right to apply for or obtain a driver's licence is suspended under section 82 or 92 as it was before its repeal and replacement came into force pursuant to the Motor Vehicle Amendment Act, 1982,
>
> commits an offence and is liable,
>
> (c) on a first conviction, to a fine of not less than $300 and not more than $2,000 and to imprisonment for not less than 7 days and not more than 6 months, and
>
> (d) on a subsequent conviction, regardless of when the contravention occurred, to a fine of not less than $300 and not more than $2,000 and to imprisonment for not less than 14 days and not more than one year.
>
> (2) Subsection (1) creates an absolute liability offence in which guilt is established by proof of driving, whether or not the defendant knew of the prohibition or suspension.

The Attorney-General of British Columbia referred the question of the validity of these Sections to the British Columbia Court of Appeal under s.1 of the Constitution Question Act, R.S.B.C. 1979, c.63.[166] After the British Columbia Court of Appeal held that s.94(2) infringed s.7 of the Charter, the Attorney-General appealed the decision to the Supreme Court of Canada.[167]

Mr. Justice Lamer, writing the principal judgment, dismissed the appeal, holding that s.94(2) violated s.7 of the Charter.[168] His Lordship held that the creation of an absolute liability offence combined with the possibility of imprisonment for such an offence violated s.7 and was not justifiable under s.1 of the Charter.[169]

In arriving at this conclusion, his Lordship discussed at length the issue of whether "the principles of fundamental justice" had a substantive as well as procedural content. His Lordship refused to adopt the American dichotomy between substantive and procedural review, and also refused to be bound by either the earlier decisions on s.1 of the Canadian Bill of Rights or statements of intention by the drafters of the Charter.[170] Rather, his Lordship adopted a purposive approach, contending that the phrase "fundamental justice" should not be given a narrow meaning because it established and qualified the scope of the fundamental rights of life, liberty, and security of the person.[171] In his Lordship's view, if s.7 only afforded procedural protection, it would add little to the guarantees provided by ss.8-14.[172] Sections 8-14 were to be read as specific illustrations of the right that s.7 was intended to grant, but they did not restrict the generality of the earlier Section.[173]

According to Mr. Justice Lamer, the rights protected by ss.8-14 provided a means of interpreting the phrase "principles of fundamental justice".[174] The guarantees provided by these sections had been developed by the common law or under international conventions on human rights, and were to be found in the basic tenets of the legal system rather than general public policy.[175] His Lordship chose not to further define his view of the precise content of "the principles of fundamental justice", preferring that the interpretation of s.7 be elaborated on a case by case assessment.[176]

In the specific case before him, Mr. Justice Lamer found that the absolute liability offence created by s.94(2) violated the fundamental principle of criminal law that the morally innocent should not be punished.[177] Although his Lordship was prepared to state that not all absolute liability offences violated s.7, those which deprived the individual of his life, liberty or security of the person did.[178] Since s.94(2) created an absolute liability offence and imposed a mandatory term of imprisonment, prima facie, it violated s.7 of the Charter.[179] Mr. Justice Lamer further held that the restrictions imposed by s.94(2) were not justifiable under s.1 of the Charter.[180] In his Lordship's view, the desirability of ridding the roads of bad drivers did not offset the risk of imprisonment of potentially innocent persons, particularly when an offence of strict liability could accomplish the same goal while providing persons with the defence of due diligence.[181]

Although the Supreme Court judgment in Ref. s.94(2) clearly sanctions substantive judicial review under s.7, it provides relatively little guidance as to the principles the lower courts should apply. What is evident, however, is that the Supreme Court of Canada does not view s.7 as giving the Canadian courts the power to overturn legislation on policy grounds alone.[182] Mr. Justice Lamer stressed that the criteria used to measure the substantive content of legislation were to be found in the basic tenets of the Canadian and international legal system and not in public policy.[183] Further, his Lordship stated that the answer to the question of whether a given principle was a "principle of fundamental justice" depended upon an analysis of the nature, sources, rationale, and essential role of that principle within the legal system.[184] Both statements demonstrate that the Supreme Court of Canada is anxious for Canadian courts to restrain their use of substantive judicial review and apply legal principles with which they are already familiar. It is apparent that the Supreme Court of Canada is determined that Canadian courts not use substantive judicial review under s.7 to become a "super legislature", substituting their opinion of what constitutes just and fair legislation for that of Parliament.[185]

Consequently, substantive judicial review of legislation under s.7 of the Charter may not strengthen the position of individuals challenging planning legislation. It is clear from Ref. s.94(2) that judicial review under s.7 will be based on current principles of law and that the courts will formulate new legal principles under this Section only in extreme cases. At common law, the landowner has a limited right to receive compensation when government regulation affects his property. The individual's right of compensation depends upon rules of statutory construction under which the courts presume that the legislature does not intend to deprive the individual of his property rights without providing compensation unless there is an express or implicit intention to the contrary.[186] Further, this presumption only operates when state action deprives the landowner of his property rights. Several Commonwealth and Canadian decisions hold that planning legislation, in general, does not deprive, take, or confiscate property rights.[187] The position appears to be the same under the Canadian Bill of Rights and the various provincial bills of rights.[188] Therefore, if Canadian courts were to exercise the restraint implicit in Ref. s.94(2), it is quite possible that the current position regarding property rights and planning legislation will remain unchanged.

Yet, members of the Canadian judiciary have often expressed judicial sympathy with landowners who suddenly find that their development options have been severely restricted by environmental and planning legislation.[189] Courts from time to time have acknowledged that government actions under such legislation have forced landowners to absorb substantial economic losses. While the courts, for the most part, have held that landowners must accept this loss as an inevitable consequence of state regulation of land use, in some cases they have declared regulatory actions ultra vires the relevant planning authority.[190] The features common to all such cases have been: first, evidence of public concern that the landowner's property be preserved for some community purpose; second, a history of previous attempts to purchase or expropriate this property; and third, the freezing of all further development pending final determination of the property's future use.[191] Such cases do not represent "takings" of property in the sense that term has been used in Manitoba Fisheries Ltd. v. The Queen[192] because property rights have not been transferred to a government body. However, the benefit of that land in its then state of development has been preserved for the use and enjoyment of the immediate community, and in some cases, future generations. In those situations where Canadian courts would have traditionally invalidated regulatory actions on grounds of bad faith or lack of statutory authority they may now find that they violate s.7 of the Charter.

2. Section 15(1)

The relevance of s.15(1) of the Charter to the regulation of property rights centres around two issues: first, whether corporations possess equality rights under the Charter, and second, the content of the rights created by s.15(1).

(a) Corporate status under s.15(1)

This issue has been canvassed previously in Chapter V.[193] Most lower courts have stated that the wording of s.15(1) precludes corporations from possessing equality rights.[194] In contrast, the Supreme Court of Canada in R. v. Big M Drug Mart Ltd.[195] has suggested that if a corporation is otherwise properly before the courts, it could avail itself of all Charter provisions relevant to its case.[196] Some commentators have argued on the basis of this decision that a corporation could invoke s.15(1) if it had standing to challenge legislation, and that legislation also potentially infringed the rights of natural persons.[197] However, these commentators admit that this reasoning would not allow corporations to use s.15(1) to challenge legislation when it would not have status under normal standing rules, or challenge legislation that dealt solely with corporate rights.[198]

The question of corporate status is particularly relevant to planning legislation regulating property rights and imposing subdivision exactions because corporations have a predominant role in land development and, in many areas, are major landowners. Based on R. v. Big M Drug Mart Ltd.[199], corporations could challenge the validity of much planning legislation because this legislation applies to all landowners, whether they are natural persons or corporations. The corporation would need to have standing aside from its s.15(1) claim, but practically this problem would not be difficult to solve because the corporation would likely challenge the legislation's validity, or actions taken under it, on a number of other common law and administrative law grounds. Standing, under this analysis, would only be an issue if s.15(1) of the Charter was the only basis of the corporation's argument, and the corporation was seeking a declaration of invalidity on that ground alone.[200]

(b) The scope of s.15(1)

The second issue of relevance to the regulation of property rights is whether s.15(1) covers the forms of discrimination and inequality that are part of land use regulations. Much of the discrimination associated with land use regulations stems from locational and other characteristics of property, buildings, and development projects. Property and buildings are given residential, commercial, or industrial designations largely because of such characteristics. Other property is placed in agricultural or greenspace zones because it is perceived as having certain attributes of long-term value to the community. Development companies are required to meet certain subdivision and development conditions because their projects create demand for municipal purposes. The nature of these conditions may vary as a result of the site of the project, its location in relation to other projects, and changing municipal policies.

None of these grounds for differentiation are remotely similar to the listed grounds in s.15(1). While it is clear that these grounds are not meant to be exhaustive, there has been some suggestion in lower court decisions that unlisted grounds of discrimination must be of the same nature as those expressly mentioned in s.15(1).[201] The suggestion that s.15(1) may only offer protection against inequality stemming from the listed grounds, or ones similar to them, has been made in the following cases: Smith, Kline and French Laboratories Ltd. et al v. Attorney-General Canada;[202] Re Shewchuk & Ricard; Attorney-General of British Columbia et al (Intervener);[203] Regina v. G.;[204] Headley v. Public Service Commission Appeal Board (Can.);[205] Singh v. Dura & Attorney-General of Alberta (Intervener);[206] Kask v.

Shimizu.[207]

As previously noted, the Federal Court of Appeal in Smith, Kline & French Laboratories Ltd. suggested that the first criterion to examine when determining whether legislation established illicit categories was whether such categories were based on immutable personal characteristics.[208] A similar opinion was voiced by Mr. Justice MacDonald in Kask v. Shimizu where His Lordship stated that the discrimination prohibited by s.15(1) was that based on some immutable physical or other characteristic of a person or a characteristic protected by some other Charter-guaranteed right or freedom.[209] In Headley v. Public Service Commission Appeal Board, Mr. Justice MacGuigan stated that the equality rights granted by s.15(1) of the Charter were modified by the word "discrimination", which implied that any alleged inequality in the law must stem from pejorative discrimination on the basis of material and unalterable personal characteristics.[210]

In other decisions, the courts have stated that economic grounds do not form one of the unlisted but prohibited grounds of discrimination in s.15(1).[211]

In addition to limiting prohibited grounds of discrimination to ones stemming from personal attributes, a number of courts have held that the restrictions established by the impugned legislation must be unfair or unreasonable before a prima facie breach of s.15(1) is proved and the legislation justified under s.1.[212] This view was first put forward by Madame Justice McLachlin in Re Andrews and The Law Society of B.C., where her Lordship stated:[213]

> The question to be answered under s.15 is whether the impugned distinction is reasonable or fair, having regard to the purposes and aims and effects on persons adversely affected ... The test must be objective, and the discrimination must be proved on a balanced probability ... The ultimate question is whether a fair-minded person, weighing the purposes against its effects on the individual, and giving due weight to the right of the Legislature to pass laws for the good of all, will conclude that the legislative means adopted are unreasonable or unfair.

This decision has since been followed by Mr. Justice Pratte of the Federal Court of Appeal in Headley v. Public Service Commission Appeal Board,[214] the majority of the British Columbia Court of Appeal in Rebic v. Collver[215] and Re Cromer and B.C. Teacher's Federation et. al.,[216] the Alberta Court of Queen's Bench in Singh v. Dura[217] and Nissho Corporation v. Bank of British Columbia,[218] and the Ontario Supreme Court in Aluminium Co. of Canada v. The Queen.[219]

Other courts have adopted a variant of this test, stating that proof of legislative distinction on the basis of one of the enumerated grounds raises a prima facie case of discrimination, while discrimination must be proven in situations where the basis of legislative classification is not listed in s.15(1). For example, Mr. Justice MacGuigan in Headley v. Public Service Commission Appeal Board stated that s.15(1) contains the internal modifier "discrimination" which indicates that in general only pejorative distinctions are prohibited.[220] In those cases dealing with enumerated grounds, the pejorative nature of the distinctions made by legislation is presumed. In other cases, the complainant has to prove discrimination.[221]

Both these views are distinct from the third position that any legislative distinction is sufficient to establish a breach of s.15(1) which then must be justified under s.1. This position has been adopted by Mr. Justice Hugesson of the Federal Court of Appeal in Smith, Kline & French Laboratories Ltd.[222] and by Mr. Justice MacDonald of the Alberta Court of Queen's Bench in Kask v. Shimizu.[223]

The importance of these differing interpretations of s.15(1) is obvious. For the individual or corporation alleging a breach of this Section, the burden of establishing a breach is far more onerous if s.15(1) contains an internal limitation. If it is necessary to establish simply that the impugned legislation categorises or classifies people or corporations on a basis of a given characteristic, then the burden on the plaintiff is much lower. In addition, the extent of legislation open to challenge will be greater since most legislation categorises persons or corporations in some manner.

The decision of Continental Distributors Ltd. v. Corporation of Township of Richmond illustrates the importance of this distinction.[224] In that case, the plaintiff sought to develop industrial land. The Township of Richmond, exercising its powers under s.719(5) of the Municipal Act R.S.B.C. 1979, c.20, established a schedule of development costs and charges applicable to the type of development promoted by the plaintiff.[225] The plaintiff challenged the assessment of the development cost charges, alleging that ss.719(5) and (6) of the Municipal Act violated s.15(1) of the Charter because they allowed municipal councils to fix standard charges bearing little relation to the costs actually generated by specific developments.[226]

The evidence of the Chief Administrator for Engineering established that the Planning and Engineering Department divided Richmond into four geographical areas. Each sector was further divided into residential, commercial and industrial zones, and development cost charges were levied in accordance with this standard per acre figure.[227]

The British Columbia Supreme Court [in Chambers], in refusing the plaintiff's claim under s.15(1) of the Charter, stated that the plaintiff had failed to show any discrimination in either the by-law or the enabling legislation. In the Court's opinion the by-law was of general application, and the plaintiff was not singled out and required to pay differently than other developers sponsoring similar projects.[228]

The distinction created by the land use by-law was not apparent on its face, since it established a set of development cost charges applicable to each developer depending on the type of development proposed. However, as each development might not generate the same development problems, the cost levied on the developers could potentially discriminate against those developments generating less need for municipal services. Using the test established by Andrews v. The Law Society of B.C.[229] such legislation would not violate s.15(1) because the inequalities created were not motivated by prejudice nor could they easily be said to be unfair or unreasonable given the goal sought to be achieved by subdivision control. However, if the developer merely had to establish that, in substance, the by-law distinguished between different developers, the by-law would more likely breach s.15(1). The onus would then shift onto the municipality or other local planning authority to justify the inequalities created by its development cost charges.

B. Possible Effects Of The Charter

1. Planning legislation affecting Property Rights

(a) General position

Of the forms of land use regulations discussed previously in Chapter III, few will be found to violate the Charter simply because many of these regulations affect rights not guaranteed by that legislation.

It is unlikely that the Canadian courts will find that property rights are included in s.7. There are many reasons why the courts would be reluctant to expand the definition of "liberty" or "security" of person to include property rights: the legislative history of the s.7; its express wording; and the long-term implications if property rights were included in the Charter.

To the extent that the Supreme Court of Canada is prepared to include a property right in s.7, it is likely that this right will be linked with the ability of the individual to attain a level of economic well-being. Under this theory, it is possible that certain forms of property ownership may be afforded some protection under s.7. For example, housing is widely recognised as fundamental to the attainment of a minimum level of economic well-being. The ownership of farm land, because it provides the basis of agricultural production, could fall into the same category. Even commercial property could fall into this category if an individual owned a small shop or business. However, it is unlikely that corporations with significant holdings of commercial property or land slated for development would find that their property rights were protected under s.7 since such land is similar in nature to a commodity.[230]

Yet, even if property rights were included in s.7, a person seeking to challenge legislation on the grounds that it violated the Charter would still have to establish that he had been deprived of such rights. To date, Anglo-Canadian courts have adopted the position that property rights must be transferred to a government body before legislation can be said to have "taken" these rights.[231] Economic deprivation, no matter how sizeable, does not constitute a taking of property. This position contrasts with that of the American courts which have recognised, since the early decision of Pennsylvania Co.

v. Mahon, [232] that regulatory action can effect a "taking" of property if it is overly restrictive or in some sense unfair.[233]

In addition, s.1 of the Charter requires the courts to assess whether an alleged breach of the Charter constitutes a reasonable limit on individual rights. Even prior to the introduction of land use planning, the common law had developed means by which offending forms of land use could be restricted.[234] Since the introduction of land use planning, the Canadian courts have recognised, to a greater or lesser extent, the importance of legislation regulating the exercise of property rights.[235] Indeed, the Supreme Court of Canada in both Soo Mill and Lumber Company v. Sault Ste Marie [236] and Calgary City Council v. Hartel Holdings Ltd.[237] has affirmed the importance of land use planning as a means of negating the many deleterious effects of land development. Thus, any challenge to planning legislation based on s.7 would have to overcome a long-held belief that state regulation of land use represents the most effective means of controlling the detrimental effects of land development.

Arguments based on s.15(1) of the Charter may also be unsuccessful. If the landowner challenging the legislation is a corporation, it faces the initial hurdle of establishing that it is entitled to the equality rights provided by that Section. In addition, landowners challenging legislation under s.15(1) face the problem of establishing that the discrimination inherent in land use planning is a form of discrimination that s.15(1) is designed to alleviate. A number of lower courts have stated that s.15(1) provides a means of combating discrimination based on personal characteristics.[238] Other courts have held that the individual must prove that the alleged inequality is inherently unfair or unreasonable in order to establish a *prima facie* breach of s.15(1).[239]

Assuming that the fundamental interpretive problems associated with ss.7 and 15(1) are resolved in favour of landowners, both individual and corporate, this does not mean that the courts will automatically find that downzoning, development freezes, and environmental legislation violate the Charter. A review of the American cases on the subject of the constitutional validity of land use planning shows that successful challenges to planning actions are relatively infrequent, particularly when they are based on the claim that the planning action has effected an uncompensated "taking" of property.

(b) Downzoning

Although it is difficult to generalise, downzoning, in many cases, will not be found to violate s.7 of the Charter. Where downzoning is used as a tool to harmonise development within a given area, it cannot be said that property rights are effectively transferred to a state body, or even that the immediate community obtains a definable benefit such as parkland. While the community does benefit from a prohibition on potentially offensive development, the benefit is widespread, and ultimately probably shared by the landowner himself.

Nor will downzoning necessarily violate s.15(1) of the Charter. The decision to downzone property reflects the local planning authority's assessment that the rights of certain landowners should be regulated in a particular manner because of the locational and other characteristics associated with their property. Although this represents a deliberate choice by local planning authorities to treat some landowners differently than others, it is not discriminatory in the sense that it is motivated by or reflects unfounded assumptions about a person's race, age, sex, or socio-economic status. Land ownership, unlike these latter factors, is largely a voluntary attribute, and is not an unchangeable personal characteristic. Moreover, as previously suggested, the different treatment accorded certain landowners actually stems from attributes associated with their property rather than with themselves. The application of s.15(1) of the Charter will therefore depend on the courts' initial determination that s.15(1) protects individuals and companies from any law creating inequalities, and not merely laws that are discriminatory in the traditional sense.

Finally, it can be argued that downzoning does not violate s.15(1) of the Charter because, in reality, it only discriminates between groups of landowners whose properties have dissimilar characteristics. All landowners, however small in number, whose properties have similar attributes are treated equally.

Downzoning can be used for other more contentious purposes, for example, when municipal councils use this device to avoid acquiring private land for public use. It is much easier to view the overall effect of such by-laws as constituting a transfer from the landowner of the benefit of the land in its undeveloped state to the community as a whole. Unlike the first case where the benefit is diffuse, in this case the benefit is directed to a more defined group. Although it is not a "taking" in the proper sense, it is much closer to one than the downzoning described above. If the Canadian courts were to adopt the American view that downzoning can effect a "taking" if it is too restrictive or unfair and unjust, then this use of downzoning may be attacked on s.7 grounds.

Additional factors that would have to be assessed in each particular case are the degree of economic loss suffered by the landowner, the extent to which he is left with an economically viable use for his property, and the existence, if any, of "investment-backed expectations".[240] None of these factors by themselves would justify a court finding that a landowner has been deprived of his property. In combination, however, they may suggest that this has occurred.

The use of downzoning to evade municipal responsibilities to acquire land for public use may also offend s.15(1) if circumstantial evidence suggests that the municipal council designed the downzoning by-law to deal with a specific development problem. In such a case, the element of discrimination is more apparent because the local planning authority intentionally treats one landowner differently than others owning property of the same type. There is no need to resort to an effects-based test to determine whether the landowner has been treated unequally.

(c) Development freezes

When development freezes are imposed temporarily and for reasonable and legitimate planning reasons, there are few problems with s.7. Again, the property cannot be said to have been taken in the sense that there has been a transfer of property rights to a government entity or even to the public. Assuming that the development freeze is temporary, the landowner's exercise of his property rights is restricted for a relatively short period. Further, under legislation such as that found in Ontario,[241] the landowner has rights to compensation in the event that the development freeze is not lifted. In other cases, the landowner may seek to have the development freeze lifted, or alternatively, force the municipality to buy his property.[242]

Development freezes imposed for an indefinite period or ones imposed as a means of preserving land arguably infringe s.7. Although they do not "take" the individual's property in the sense of transferring it to a government body, they do preserve the property in its undeveloped state for the benefit of the immediate community. The benefit created for the community can be of considerable importance, as can be the savings to the local planning authority. The costs absorbed by the landowner are far greater than those associated with temporary development freezes and must be borne for a much longer, perhaps indefinite, period. If Canadian courts were to adopt the American view of excessively restrictive regulations, development freezes of this type could constitute a deprivation of property.

Yet, the landowner must also establish that such development freezes violate the principles of fundamental justice. This point may be more difficult to establish, given the present uncertainty surround this concept. Certainly, if the landowner alleges that the development freeze violates the principles of fundamental justice because he has not been compensated for his loss, he would have a difficult argument to make. The accepted position of Canadian courts is that land use regulations do not give rise to any claim for compensation on the part of the individual affected by them.[243] Since the Supreme Court of Canada has held that the principles of fundamental justice are derived from accepted common law doctrines[244], it is possible that the courts would not consider that a development freeze violates s.7 simply because the individual has not been compensated for his loss.

On the other hand, the principles of fundamental justice may require that a local planning authority fulfil its statutory obligations to purchase or expropriate land if it wishes to preserve that property for the community's use. The view that a local planning authority should not use its general regulatory powers to evade its more specific statutory responsibilities, while not a common law doctrine as such, is a common element in many decisions where development freezes have been declared invalid.[245] Therefore, in appropriate circumstances, the landowner may be able to argue that the local planning authority has breached the principles of fundamental justice by trying to evade fulfilling its specific statutory obligations.

(d) Environmental Regulation

Environmental legislation that designates certain land as a special area, such as a wildlife habitat or environmental reserve, but provides some form of compensation to the landowner probably does not violate s.7 of the Charter. Even though the landowner has been deprived of his ability to develop his land as he wishes, he does receive some form of monetary redress from the state. Unless this compensation was totally inadequate, the existence of this compensation would likely meet the requirements of fundamental justice.

Under s.15(1), the landowner could plausibly argue that his rights had been infringed since other landowners' properties remain unaffected by the special area designation. This unequal treatment would prima facie constitute a breach of s.15(1), if s.15(1) is read as protecting the individual against any legislative distinction and not merely those which are unfair or unreasonable or motivated by prejudice. Under s.1, however, the distinction created by special area designations may be balanced both by the importance of the goal sought to be achieved by the provincial government and by the existence of compensation.

Environmental legislation which does not include a form of compensation would not violate s.7. Even though the landowner affected by such legislation suffers severe restrictions on his ability to use his land and substantial economic loss, traditional common law principles suggest that he has no inherent right to compensation from the state.[246] Therefore, based on the principles articulated by the Supreme Court of Canada in Ref s.94(2)[247], environmental legislation that severely restricts the individual's property rights and provides no compensation, would not offend the principles of fundamental justice.

Arguments based on s.15(1) may prove stronger, depending upon the circumstances under which the "special area" designation is imposed. If, for example, the landowner's property was the only one designated as a "special area", then s.15(1) would arguably be violated simply because the landowner would be the only one subjected to the stringent restrictions of the special area designation. The obvious inequitable application of the law is not easily balanced by the argument that the legislation potentially affects a variety of landowners. In many cases, special areas are gazetted and are site-specific. This form of land use regulation therefore differs from by-laws downzoning land and development freezes, both of which tend to be of more general application and have a more immediate effect. It is only in theory that legislation allowing for special area designations affects landowners generally.

2. Subdivision Exactions

Subdivision exactions create the following problems that possibly may be the subject of Charter review. These problems are: the dedication of land or provision of money in lieu of such land; the imposition of general subdivision conditions regardless of the individual needs of the development; the funding of general municipal services; and oversizing. The discussion which follows assumes that the many interpretative problems associated with ss.7 and 15(1) are resolved in favour of the landowner.

(a) The dedication of land

One of the initial questions raised by subdivision exactions is whether the dedication of land or the payment of money can be supported in view of s.7. American courts have developed two theories to explain why local planning authorities can demand that developers dedicate land for parks, roads, and municipal facilities or provide moneys in lieu thereof. In Ridgefield Land Co. v. City of Detroit[248] and Billings Properties Inc. v. Yellowstone County[249] American courts stated that the dedication of land was a voluntary act on the part of the developer, and constituted a quid pro quo for the financial advantages stemming from the registration of a plan of subdivision. American courts view the developer as a producer of a product, namely residential housing. In return for the profit from a development project, the local planning authority requires the developer to develop his project in a form that minimises its adverse economic impact on the community.

The leading American decision on land dedications is Ayers v. City Council of Los Angeles.[250] In that case, the owners of 13 acres of land wanted to develop a residential subdivision, the last one to be developed in the immediate area. The City of Los Angeles had previously planned to widen the main boulevard and to condemn a portion of the 13 acres for that purpose. The developer created a cellular design for the subdivision in order to minimise the amount of land required for street purposes and to interfere to the least extent with the free-flow of traffic. Access was provided by tributary streets perpendicular to the main boulevard.[251]

The City of Los Angeles imposed four conditions on the grant of development approval: the dedication of a ten-foot strip for the purposes of widening the main boulevard; the dedication of another ten-foot strip for the planting of trees; the dedication of a triangle of land in order to eliminate an existing traffic hazard; and the dedication of a eighty-foot strip for the purposes of a street running through the subdivision.[252] Ayers challenged these dedications, arguing that the City had exercised its power of eminent domain under the guise of subdivision regulation in order to avoid paying for the land taken.[253]

The California Court of Appeal upheld the validity of all four conditions against the developer's allegation that such conditions constituted an exercise of the eminent domain power.[254]

The Court upheld these conditions on the basis that they were all necessitated by the increased traffic created by the subdivision itself.[255] The Court noted that had the developer used a more traditional subdivision design, he would have been requested to construct roads for the diversion of traffic in and out of the sub-division at a greater personal expense than what was presently required. Consequently, an overall benefit flowed to the developer from the City's decision to allow him to use the cellular design.[256] The Court found that even if the more traditional form had been used, a ten-foot strip would have been required in any event for the widening of the main boulevard because of additional traffic.[257] The Court also found that both the buffer strip and the triangle for the traffic island would have been required if the more traditional subdivision design had been used.[258] The eighty-foot strip for street widening was similarly required by the increased traffic caused by the new subdivision.[259]

Although the holding in Ayers v. The City of Los Angeles[260] reflects the Court's assessment that the subdivision actually generated the need for additional land to be dedicated to road use, the language employed by the Court has been cited for the proposition that a land owner may be required to pay for improvements which are generated by the use of land whether or not the community is also benefited by the expenditure.[261] For example, the Court at the conclusion of its analysis of the subdivision conditions, dismissed the contention that the City had exercised its power of eminent domain:[262]

> It is the petitioner who is seeking to acquire the advantage of lot sub-division and upon him rest the duty of compliance with reasonable conditions for.... dedication.... so as to conform to the safety and general welfare of the lot owners in that sub-division and of the public.

Furthermore, when discussing the question of the eighty-foot strip, the Court stated:[263]

> It is no defence to the conditions imposed in a sub-division map proceeding that their fulfilment will incidentally also benefit the City as a whole. Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the sub-division and the neighbourhood generally are appropriate for consideration.

The view expressed by the American courts that sub-division exactions are warranted as a quid pro quo for the grant of subdivision approval is similar to the rationale discussed in Chapter IV. There, it was suggested that subdivision exactions could be justified on the basis of a user-pay principle.[264] Thus, even though subdivision exactions requiring the dedication of land may theoretically constitute a taking of property or a deprivation of property rights, it can be argued that such exactions do not offend the principles of fundamental justice and may be justified under s.1 of the Charter. Certainty, it is not unfair that the developer provide land for roads, parks, and other facilities when the need for such services are generated by the increased population within the development project itself. If it is assumed that the cost initially borne by the developer is passed on to the consumers of housing, the incidence of the subdivision exaction will ultimately fall on the appropriate party.

(b) Uniform subdivision exactions

Uniform subdivision conditions imposed by local planning authorities regardless of the specific needs of the development project could be attacked on the grounds that they offend s.15(1) of the Charter. These conditions fulfil the traditional view of an equality rights provision, which guarantees the equal application of a law to the class of persons affected by its terms, because they are imposed on all developers. However, in substance, these conditions cause inequality amongst developers, and ultimately inequality amongst the purchasers of new housing. The development project that generates less need for infra-structure or public services finishes by subsidising development projects that generate greater needs for infra-structure and services. This exemplifies how the theoretically equal application of the laws creates substantive inequalities and, consequently, may offend s.15(1) of the Charter.

To date, there has been one decision by a Canadian court on this issue. In Continental Distributors Ltd v. Corporation of the Township of Richmond,[265] a British Columbia Chambers Judge held that a zoning by-law did not offend s.15(1) when it stipulated uniform development costs charges based on the nature of the development.[266] The Chambers Judge, in rejecting the developer's claim, stated that development cost charges were of uniform application, and that the developer *prima facie* fell within the class of individuals required to pay such charges.[267] The Chambers Judge distinguished this form of by-law from one which may have required the plaintiff to pay different amounts than that paid by other developers of similar projects.[268]

As with many cases in which violations of s.15(1) are alleged, it is crucial to determine the substance of the equality rights provision. If s.15(1) is viewed as providing merely a right to the equal application of the laws, then a zoning by-law that imposed the same development charges on all developers of industrial sites would not violate the equality rights provision. However, if s.15(1) is understood as providing a right to equality in the substance of the law, then this form of by-law would potentially violate the Section. For, in effect, the developer whose project generates a lesser demand for services and infra-structure must pay the same amount as the developer whose project's demand is met by or exceeds the development cost charges.

Further, s.1 of the Charter may not save subdivision exactions imposed as a matter of general policy. The underlying rationale of subdivision exactions is that the developer should provide, or pay for, infra-structure and services the need for which are generated by his development. While it is possible for local authorities to provide such services and impose special taxes to recover their costs, the majority of Canadian municipalities have elected to make developers responsible in the first instance because of the cost involved. Applying the test established in R. v. Oakes,[269] the goal sought to be achieved by the imposition of subdivision exactions is socially important, but may not be so important as to justify overriding a right of equality in both the application and substance of land use by-laws. Even if the goal were deemed of such overwhelming importance, the means chosen do not fully carry out this goal since the user pay principle is undermined.

The only justification for this form of subdivision exaction is one of administrative efficiency. In Singh v. Minister of Employment and Immigration,[270] Madame Justice Wilson has stated that administrative efficiency will only justify governmental actions, policies, or legislation if the goal itself is of overwhelming importance and the restrictions imposed on Charter-guaranteed rights are necessary for achievement of this goal. However, in the subsequent case of Edwards Books and Arts Limited v. The Queen,[271] both Chief Justice Dickson and Mr. Justice La Forest stated that governments should be given a certain latitude in developing the legislative means by which they seek to effect important policies.[272] The Chief Justice especially noted that the courts should not easily interfere in matters of business regulation.[273]

(c) Exactions funding general municipal services

The imposition of subdivision exactions that effectively cause developers to fund general municipal services arguably breaches ss.7 and 15(1) of the Charter. These exactions can be viewed as depriving the developer of his property rights, since in essence they require the developer to transfer a sum of money, in lieu of constructing or providing a specific service, to the local planning authority for later use by the community. Unlike the case of exactions necessitated by the requirements of the subdivision itself, exactions requiring the developer to fund general services cannot be justified by the user-pay principle since the increased population of the new development project creates only a fraction of the demand for this service. And even though all new developments may be required to contribute to the funding, the subdivision exaction is still inequitable because current residents or even future residents after a certain date may not have to pay a proportionate share of the cost.

Notwithstanding the obvious inequities associated with this practice, American courts have been divided on the issue of whether developers can be made to contribute to the cost of general municipal services. The statements of the California Court of Appeal in _Ayers_ v. _The City of Los Angeles_[274] suggests that developers can be required to contribute to general municipal services. However, other State courts have divided over their interpretation of this decision, with some courts favouring a much stricter approach.

For example, in _Pioneer Trust Savings Bank_ v. _Village of Mount Prospect_, the Illinois Supreme Court held that a developer need only pay for those services the need for which are specifically and uniquely attributable to his development project.[275] This case involved a mandamus proceeding to compel the city to approve the developer's subdivision without requiring him to dedicate land for a local school, as required by a local ordinance. The Court held the ordinance invalid because the city had been unable to show that the exaction was related to the new development.[276] The Court concluded that the developer could not be forced to remedy a problem resulting from the overall development of the community, and stated the following rule:[277]

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.

This rule was adopted in a modified form, by the Wisconsin Supreme Court in Jordan v. Village of Menomee Falls[278] where the Court upheld an ordinance requiring a developer to pay a fixed fee per lot in lieu of the dedication of land for park and school purposes.[279] The Court, after quoting from the Pioneer case[280], held that the requirement that the subdivision exactions be specifically and uniquely attributable to the subdivision was an acceptable test provided that the test was not so restrictively applied as to place an unreasonable burden of proof on the local planning authority.[281]

On the facts, the Court found that the ordinance constituted a reasonable exercise of the city's regulatory power on the basis of various studies showing a need for parkland in the community and demonstrating that the proposed development contributed to this need.[282]

In Jenad v. Village of Scarsdale, the New York Court of Appeals upheld an ordinance requiring developers to dedicate ten percent of their land for park or pay a fee of $250 per lot in lieu of the dedication of land.[283] The money collected was to be credited to a fund to be used for park, playground, and recreational purposes as determined from time to time by the city.[284] The city was further authorized to waive the fee and dedication requirements under special circumstances.[285] The developer had earlier registered one subdivision, and had been granted approval to do so on the condition that the appropriate percentage of land be set aside at the time of the developer's second subdivision. At that time, the city determined that the developer was unable to dedicate land suitable for park and assessed a fee of $6,000 instead, based on the number of lots in the two subdivisions.[286]

The Court upheld the validity of the ordinance,[287] overruling the earlier decision of Gulest Associates, Inc. v. Town of Newsburgh[288] which had held fee requirements invalid because there was no requirement in the enabling legislation that the subdivision exaction be correlated to the benefit conferred on the development.[289] The Court noted that even if the decision in Gulest had been correct, it would have little bearing on the present case because the fees collected were to be put into a fund for park and recreational purposes which would be used to acquire parks in the community.[290] The Court cited the decision of Jordan v. Village of Menomee Falls[291] as support for this finding, stating that the earlier case had decided that the dedication of land would be upheld if evidence reasonably established that the municipality would be required to provide more land for schools, parks, and playgrounds as a result of the approval of the subdivision.[292]

Finally, the most lenient approach to subdivision exactions requiring the developer to fund general municipal services is that of the California Supreme Court in Associated Home Builders Inc. v. City of Walnut Creek.[293] In that case, the State of California amended s.11546 of the Subdivision Map Act to invest municipal governments with the authority to require the dedication of land, or the payment of a fee in lieu thereof, or a combination of both, for park purposes as a precondition of subdivision approval.[294] Such exactions were authorized only if certain requirements were met by the municipal government: definite standards must be enacted for determining the amount of the exaction; the exaction must be used solely for the purpose of providing facilities to serve the subdivision; a general plan must exist which contained provisions for park and recreational facilities; the amount of the exaction must bear a reasonable relationship to the projected use of the park and recreational facilities by future inhabitants of the subdivision; and a commencement date for the facilities must be specified.[295]

Walnut Creek drew up the appropriate plans and regulations under which developers were required to dedicate land or pay fees based on the number of prospective residents in their subdivisions.[296] If the dedication of land was impossible, fees were levied on the basis of the fair market value of the land that otherwise would have been dedicated.[297] Both the land and fees were to be used to provide park and recreational facilities to serve the particular subdivisions.[298]

The developer challenged the constitutionality of the State enabling legislation and the municipal ordinance on a number of grounds[299], two of which are relevant to the discussion of the Charter's effect on subdivision exactions.

The developer argued that s.11546 was a disguised exercise of the eminent domain power and authorized an uncompensated taking of the developer's property.[300] The developer argued that the need for parks and recreational facilities stemmed from the demands of the entire community and not just from the activities of a particular subdivision.[301] As a consequence, s.11546 could only be justified if exactions were restricted to the specific needs generated by that subdivision alone.[302]

The developer also contended that s.11546 was invalid because it did not relate the amount of the exactions to the benefit of the subdivision concerned.[303] The developer argued that s.11546 merely authorized an assessment of fees and that it constituted a tax because there was no provision for a direct benefit to the subdivision.[304] Further, as a taxation statute, it denied future residents of the subdivision the equal protection of the laws.[305]

The Court rejected both these arguments, and held that subdivision exactions did not need to be specifically attributable to the requirements of the new subdivision.[306]

The Court relied on the earlier case of Ayers v. The City of Los Angeles[307] as authority for the following propositions: the developer must comply with reasonable conditions imposed for the general welfare of the lot owners and the public; subdivision enactions were not improper because they incidentally benefited the city as a whole; and future, as well as present, needs could be taken into account in determining subdivision exactions.[308] In addition, the Court justified s.11546 on the ground of a general and urgent public need for recreational facilities caused by present and future subdivisions.[309]

The Court also dismissed the developer's second argument[310] without discussing any of the constitutional issues raised. The Court stated that s.11546 required the exactions be used to serve the subdivision and that the amount of the exaction bear a reasonable relationship to the use of the facilities by future residents of the subdivision.[311] These requirements, in the Court's view, were sufficient to dismiss the plaintiff's claim that the fees assessed represented a discriminatory tax on future residents.[312]

The decision of Associated Home Builders Inc. v. City of Walnut Creek[313] has been severely criticized as having laid the legal framework for the imposition of subdivision exactions that bear only an incidental relationship to the requirements of a specific subdivision.[314] It has also been criticized for allowing municipalities to partially solve local fiscal problems by requiring the developer to bear the burden of costs made necessary by the growth of the community as a whole.[315] In this regard, it should be noted that the Court itself distinguished between capital costs, such as sewers, roads, and parks, and costs for services, such as increased costs of fire and police protection and costs associated with additional government services of all types.[316] The Court stated that s.11546 was justified only because the increase in residents generated a need for a park, and the land or fees were to be used eventually for the new residents.[317] Despite the Court's lenient interpretation of the municipality's power, it would seem that subdivision exactions could not be used to make developers pay for such items as public transport, ambulance, police and fire services, and administrative costs.

The position of some American courts towards subdivision exactions requiring developers to fund general municipal services provides one example for Canadian courts to follow. Despite the inequities of this practice, Canadian courts could determine that the goal of ensuring adequate provision of services and facilities is so socially important as to justify infringing any constitutionally guaranteed right that developers and consumers of housing might have. Provided that a reasonably close relationship existed between the purpose of the subdivision exaction and the demand for services generated by the subdivision, the courts under s.1 of the Charter may not require proof of an exact correlation.

(d) Oversizing

The policy of requiring developers to oversize services and pay off-site levies may infringe the Charter if these policies do not include some mechanism whereby the cost to the initial developer is distributed evenly between himself and subsequent developers.

Off-site levies and over-sizing potentially infringe s.7 of the Charter because they require developers to contribute services and money in excess of the demands that their particular subdivision places on the existing infrastructure. They may also infringe s.15(1) if costs are averaged and one developer must pay a disproportionate share of the facility in question. As well, over time, a system of averaging costs may create inequalities between the first development and succeeding ones because the first development benefits from projected economics of scale while subsequent developers face excessive carrying charges. This problem becomes particularly acute if no time limit is established for the anticipated development.[318]

If, however, a system was devised whereby the costs of off-site levies and oversizing could be distributed evenly between the first developer and any successive developments, then these practices may not offend the Charter. One suggested scheme is that at any point of time developers contribute an average per acre fee to the cost of a facility which meets the needs of the then developed area.[319] The municipality would be responsible for financing the marginal cost of excess capacity, and each subsequent development would reimburse both the prior developer and the municipality for the cost of any excess capacity which accommodates his development. Such a scheme would ensure, to the extent possible, that the costs of services and facilities would be distributed evenly among the municipality, the first developer, and any future developers. Since, an exact relationship between the costs of services and the needs of the development is not required under s.1, it is likely that such a scheme would comply with the principles established by R. v Oakes.[320]

C. CONCLUSION

Despite the enormous potential of the Charter to provide a means for the wholesale review of exclusionary zoning, subdivision exactions and legislation regulating the exercise of property rights, it is very likely that the

Charter will have little impact on these planning techniques. Many of the rights and freedoms affected by these planning techniques are not protected by the Charter. Even though the Charter does contain general rights capable of a broad interpretation, such as the rights of liberty and security of the person to and to the equal protection of the laws, the courts may be reluctant to extend those rights to cover the types of interests affected by exclusionary zoning, subdivision exactions and legislation affecting the exercise of property rights.

Finally, if the courts did decide that these interests were potentially protected by the Charter, the restrictions imposed on them by exclusionary zoning, subdivision exactions, development freezes and downzoning could still be justified under s.1. In decisions prior to the enactment of the Charter, the courts have indicated their acceptance of land use planning as a means of regulating the community's use of its land and financial resources for the benefit of both existing and future residents. They have also indicated their reluctance to interfere with land use decisions made by local and provincial planning authorities in consultation with planners, administrators, and other specialists.

This judicial deference may continue under the Charter, especially in the courts' analysis of provincial legislation and municipal by-laws affecting property rights, the financing of services and facilities by development companies, and controversial subjects such as the construction of low-cost housing and certain types of group homes in low-density residential areas. In the first two cases, the courts may require only that the restrictions imposed be reasonably required to meet the objectives of the provincial and municipal governments. In the latter cases, the courts may decide that, in light of the controversial nature of the development, the municipality's plans for introducing this development into the community restricts individual rights to the least extent possible.

Notwithstanding this general position, the courts may find certain specific planning techniques do violate the Charter. The most likely candidates are land use by-laws defining "family" and "dwelling" in a restrictive manner. These by-laws affect freedoms expressly included in the Charter, such as the freedom of association and the freedom of religion. Because they also discriminate between traditional and non-traditional families and potentially do so on the basis of religion and mental and physical disability, they affect equality rights protected by s15(1). Discretionary development controls may also violate the Charter if there is evidence of a discriminatory motive, and the rights of religious orders, racial or ethnic minorities, and the mentally and physically disabled are affected. Other exclusionary zoning techniques are likely to remain unaffected by the Charter.

Subdivision exactions, development freezes, downzoning by-laws and environmental regulations will only be subject to review if property rights are included in the Charter and economic interests become a recognized ground of discrimination. Yet, even if property rights and economic interests are incorporated into the Charter, the validity of most of these planning techniques will remain unaffected. Downzoning by-laws, development freezes and environmental regulations will only violate the Charter if they are used by provincial and local governments as a means of escaping their statutory obligations to acquire and pay compensation for private land which is to be used for a public purpose. Subdivision exactions will only violate the Charter if municipal planning authorities impose them in order to fund the provision of general municipal services, or perhaps, to ensure that facilities, such as storm water drains and sewerage systems, have sufficient capacity to service future developments.

ENDNOTES

1 Becker v. The Queen on Right of Alberta (1983) 45 A.R. 37 (Alta. Q.B.); Home Orderly Services Ltd. v. Government of Manitoba (1987) 32 D.L.R. (4th) 755 (Man Q.B.); Re Yorkville North Development Ltd. and City of North York (1987) 57 O.R. (2d) 172 (Ont. Dist. Ct); Hall and Fineburg v. Attorney-General of New Brunswick and Village of Grand Bay (1986) 72 N.B.R. (2d) 399 (N.B.Q.B.); Re Grant and Crane Construction Corp. (1986) 28 D.L.R. (4th) 607; Gersham Produce Company Ltd. v. The Motor Transport Board (1985) 17 C.R.R. 132 (Man. C.A.); Milton v. the Queen (1985) 16 C.R.R. 215 (B.C.Co.Ct); Re Malartic Hygrade Gold Mines (Canada) Ltd. and the Ontario Securities Commission (1986)24 C.R.R. 1 (Ont.Div.Ct.); Manicom v. County of Oxford (1985) 21 D.L.R. (4th) 611, 52 O.R. (2d) 137, 30 M.P.L.R. 100.

2 Smith, Kline and French Laboratories Ltd. et al v. Attorney-General of Canada (1986) 12 C.P.R. (3d) 385, aff'g 7 C.P.R. (3d) 141, [1986] 1 F.C. 274.

3 (1982) 135 D.L.R. (3d) 307, 1 C.R.R. 307, 40 N.B.R. (2d) 42 (N.B. Prov. Ct.).

4 (1983) 6. C.R.R. 136 (Ont. Prov. Ct.).

5 (1982) 1 C.R.R. 307.

6 The Sales Tax Act, R.S.N.B. 1973, c.S-10, s.19(1).

7 (1982) 1 C.R.R. 307 at 309-14.

8 Id. at 312.

9 Id. at 324.

10 Id. at 315.

11 Id.

12 Id. at 314-15.

13 (1982) 7 C.R.R. 46 at 52.

14 Id. at 63.

15 Id. at 52.

16 *Id.*

17 (1983) 6 C.R.R. 136 at 163.

18 *Id.* at 137.

19 *Id.* at 163.

20 *Id.* at 161-163.

21 *Id.* at 161.

22 408 U.S. 564 (1972).

23 See discussion Chapter V at n.156 ff.

24 (1983) 6 C.R.R. 136 at 164.

25 (1985) 15 C.C.C. (3d) 292, 12 C.R.R. 201, 48 O.R. (2d) 249.

26 (1985) 12 C.R.R. 201 at 208-210.

27 *Becker* v. *The Queen on Right of Alberta* (1983) 45 A.R. 37, (Alta. Q.B.); *Home Orderly Services Ltd.* v. *Government of Manitoba* (1987) 32 D.L.R. (4th) 755 (Man. Q.B.); *Re Yorkville North Development Ltd. and City of North York* (1987) 57 O.R. (2d) 172 (Ont. Dist. Ct); *Hall and Fineburg* v. *Attorney-General of New Brunswick and Village of Grand Bay* (1986) 72 N.B.R. (2d) 399 (N.B.Q.B.); *Re Grant and Crane Construction Corp*. (1986) 28 D.L.R. (4th) 607; *Gersham Produce Company Ltd.* v. *The Motor Transport Board* (1985) 17 C.R.R. 132 (Man. C.A.); *Milton* v. *the Queen* (1985) 16 C.R.R. 215 (B.C.Co.Ct): *Re Malartic Hygrade Gold Mines (Canada) Ltd. and the Ontario Securities Commission* (1986) 24 C.R.R. (Ont.Div.Ct.). 1; *Manicom* v. *County of Oxford* (1985) 21 D.L.R. (4th) 611, 52 O.R. (2d) 137, 30 M.P.L.R. 100 (Ont. Div. Ct.).

28 *Home Orderly Services Ltd.* v. *Government of Manitoba* (1987) 32 D.L.R. (4th) 753 at 760; *Re Grant and Crane Construction Corp.* 1986) 28 D.L.R. (4th) 606 at 610; *Milton* v. *The Queen* (1985) 16 C.R.R. 215 (B.C. Co. Ct.) at 221-222; *Manicom* v. *County of Oxford* (1985) 21 D.L.R. (4th) 611, 52 O.R. (2d) 137, 30 M.P.L.R. 100 at 109.

29 Edward McWhinney, *Canada and the Constitution 1979-1982* (1982) 58.

30 Milton v. The Queen (1985) 16 C.R.R. 215 (B.C. Co. Ct.) at 221-222.

31 Gersham Produce Company Ltd. v. The Motor Transport Board (1985) 17 C.R.R. 132; Milton v. The Queen (1985) 16 C.R.R. 215, at 223-224; Re Malartic Hygrade Gold Mines Canada Ltd. and Ontario Securities Commission (1986) 24 C.R.R. 1 at 8.

32 Id.

33 Becker v. The Queen in right of Alberta (1983) 45 A.R. 37 (Alta. Q.B.) at 41-42; The Queen et. al v. Operation Dismantle Inc. et. al [1983] 1 F.C. 745 (Fed. C.A.) at 742; Smith, Kline & French Laboratories Ltd. v. Attorney-General of Canada 7 C.R.R. (3d) 145, [1986] 1 F.C. 274 (Fed. Ct. T.D.) at 278; aff'd on this point (1986) 12 C.P.R. (3d) 385 (Fed. C.A.).

34 Id.

35 (1986) 35 D.L.R. (4th) 1 at 54.

36 (1987) 51 Alta. L.R. (2d) 97 (S.C.C.) at 167-68.

37 (1987) 51 Alta L.R. (2d) 97 (S.C.C.) at 137.

38 (1985) 17 D.L.R. (4th) 422 (S.C.C.) at 458.

39 Re Singh and Minister of Employment and Immigration and six other appeals (1985) 17 D.L.R. (4th) 422 (S.C.C.) at 462-63; R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295 at 355-57.

40 [1985] 1 S.C.R. 295 at 359.

41 (1982) 135 D.L.R. (3d) 307, 1 C.R.R. 307, 40 N.B.R. (2d) 42 (N.B. Prov. Ct.).

42 (1983) 6 C.R.R. 136 (Ont. Prov. Ct.).

43 Dale Gibson, The Law of the Charter: General Principles (1982) 85-86.

44 Township of Scarborough v. Bondi [1959] S.C.R. 444, 18 D.L.R. (3d) 161; Soo Mill Lumber Co. Ltd. v. Sault Ste. Marie [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1, 2 N.R. 429; Calgary City Council v. Hartel Holdings Ltd. [1984] 4 W.W.R. 193, 31 Alta. L.R. (2d) 97, 53 A.R. 175.

45 Discussed infra n. 82 ff.

46 *The Oxford English Dictionary* (3ed. 1973) 269.

47 *Webster's New World Dictionary* (3ed. 1981) 606.

48 *Black's Law Dictionary* (5ed) 607.

49 *Id*. 306.

50 William Stoebuck, "Police Power; Takings and Due Process" (1980) 37 *Washington and Lee Law Review* 1055 at 1093-94.

51 *Belfast Corporation* v. *O.D. Cars Ltd.* [1960] A.C. 490; *Ulster Transport Authority* v. *James Brown & Sons Ltd.* [1953] N.I. 79, *Manitoba Fisheries Ltd.* v. *The Queen* [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462, [1978] 6 W.W.R. 496, 23 N.R. 159; *Reinhold Trelenberg* v. *The Minister of the Environment (Alberta)*, unreported, J.D. of Edmonton Q.B. 104637, 107234 (Alta Q.B.).

52 [1960] A.C. 490

53 *Id*. at 516.

54 *Id*. at 492

55 *Id*.

56 *Id*. at 520, 522.

57 *Id*. at 417.

58 Id. at 522.

59 *Id*.

60 *Id*.

61 *Id*. at 524.

62 [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462 at 473, [1978] 6 W.W.R. 496, 23 N.R. 159.

63 (1978) 88 D.L.R. (3d) 462 at 474.

64 *Id*. at 463.

65 *Id*.

66 *Id*.

67 Id. at 464.

68 Id. at 464.

69 Id.

70 (1977) 78 D.L.R. (3d) 393, [1978] 1 F.C. 485, aff'g 72 D.L.R. (3d) 456, [1977] 2 F.C. 457.

71 88 D.L.R. (3d) 462 at 468.

72 Id.

73 Id. at 473-74.

The Supreme Court of Canada has again addressed the issue of when regulatory action constitutes a taking in The Queen v. Tener (1985) 17 D.L.R. (4th)1. In that case, the respondent company had acquired mining rights in an area subsequently designated as a provincial park. A series of amendments to the relevant park and mining legislation gradually limited the company's ability to exploit its mining rights. Finally, in 1973, the area was declared a Class A Park. Under s.9(1) of the Park Act, R.S.B.c. 1979, c.309, the effect of this designation was to prohibit exploitation of natural resources located in the park unless authorized by permit. The company applied for and was refused a permit. The major issue in the case was whether the refusal of the permit constituted a "taking" of property rights.

The Supreme Court of Canada held that the refusal of the permit did effect a "taking" of the company's right to exploit minerals (which was also held either to be an interest in land or a profit a prendre). Mr. Justice Estey, with whom Justices Beetz, McIntyre and Chouinard concurred, stated the denial of the permit in law reduced the company's property rights, so that the Crown effectively recovered a part of the mining rights originally granted the company. Mr. Justice Estey held that this situation constituted a taking, analogous to the taking in Manitoba Fisheries Ltd. v. The Queen. His Lordship further distinguished the actions of the provincial government from zoning and other regulations specifying permissible activities on land, stating that zoning added nothing to the value of public property whereas the government's actions enhanced the value of a public park.

Madame Justice Wilson, with whom the Chief Justice concurred, held that the effect of the refusal to issue a permit absolutely prevented the company from exercising its right to go on the land and sever the minerals so as to exploit them for its advantage. Her Ladyship distinguished the situation where the refusal of a permit constituted the regulation of property rights and one where this refusal defeated the company's entire interest in the land. Her Ladyship further held that the Crown derived a benefit from the refusal to grant a permit since effectively the Crown had removed an encumbrance from the land.

74 [1953] N.I. 79.

75 Id.

76 Id. at 113, 116.

77 Id. at 116.

78 Unreported, J.D. of Edmonton, Q.B. 104637, 107234.

79 Id. at 24-25.

80 Id. at 32-33.

81 Id. at 32.

82 Joseph Sax, "Takings and the Police Power" (1964) 74 Yale L.J. 36 at 61-76. In its enterprise function, the government actively participates in community's economic life, for example, by operating and maintaining schools, recreational facilities and public transit. In its arbitral capacity, the government allocates rights to use land between individuals with competing interests.

83 William Stoebuck, "Police Power, Takings and Due Process" (1980) 37 Washington and Lee Law Review 1055 at 1093-94.

84 Id. at 1089-93.

85 Id. at 1093.

86 United States v. Dickinson, 331 U.S. 745 (1947); United States v. Cansby, 328 U.S. 256 (1946).

87 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d. 631 (1978).

88 Fred F. French Investing Co. v. City of New York, 39 N.Y. 2d 587, 385 N.Y.S. 2d. 5, 350 N.E. 2d. 381, cert. denied and appeal dismissed, 429 U.S. 990, 97 S. Ct. 515, 50 L. Ed. 2d. 602 (1976); Spears v. Beale, 48 N.Y. 2d 254, 397 N.E. 2d 1304, 422, N.Y.S. 2d. 636 (1979).

89 260 U.S. 393 (1922).

90 Id. at 394.

91 Id.

92 Id. at 396.

93 Id. at 413-416.

94 Id. at 414.

95 Id. at 415.

96 Id at 414-15.

97 272 U.S. 365 (1926).

98 Id. at 395.

99 Id. at 384.

100 Id.

101 Id.

102 Id. at 387.

103 Id. at 395.

104 Id. at 386-87.

105 Id.

106 Id at 395.

107 438 U.S. 104 (1978).

108 Id. at 114.

109 Id. at 117.

110 Id. at 122

111 Id. at 123-24

112 *Id*. at 130-31.

113 *Id*. at 124.

114 *Id*. at 124.

115 *Id*. at 138.

116 *Id* at 126-27, 128.

117 *Id*. at 132.

118 *Id*. at 133-34.

119 *Id*. at 136-37.

120 *Id*.

121 *Id*. at 124.

122 *Id*. at 125.

123 *Id*. at 124.

124 399 So. 2d. 1374 (Fla). The six factors were:

1. the existence of a physical invasion of property;
2. whether all economically viable use of the property was precluded;
3. whether the regulatory action conferred a public benefit or prevented a public harm;
4. whether the regulatory action promoted the health, safety and welfare of the public;
5. whether the regulatory action was arbitrary or capricious; and
6. the extent to which investment-backed expectations were curtailed.

125 438 U.S. 104 (1978) at 105-6.

126 (1967) 80 *Harvard L. Rev.* 1165.

127 *Id*. at 1215.

128 *Id*. at 1216-17.

129 *Id*. at 1233.

130 *Id*. at 1217.

131 444 U.S. 164 (1979).

132 *Id*. at 167-69.

133 *Id*. at 179.

134 *Id*. at 168-69.

135 *Id*. at 179.

136 *Id* at 178.

137 *Id*. at 179.

138 *H.F.H. Ltd.* v. *Superior Court of Los Angeles*, 15 Cal. 3d 5098, 547, P. 2d, 25, 237, Cal. Rptr. 365; *Agins* v. *Tiburon*, 447 U.S. 255 (1980).

139 237 Cal. Rptr. 365.

140 *Id*. at 365, 368.

141 *Id*.

142 272 U.S. 365 (1926).

143 *Id*. at 370.

144 *Id*.

145 *Id*. at 374

146 447 U.S. 255 (1980).

147 *Id*. at 256-260.

148 *Id*. at 260.

149 *Id*. at 261, n.78.

150 *Id*. at 260.

151 *Id*. at 262.

152 *Id*.

153 *Id*.

154 *Id*.

155 *Id*. at 260

156. *Id* at 262.

157. *Penn Central Transportation Co.* v. *New York City*, 438, U.S. 104 (1978) *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922) *Kaiser Aetna* v. *The United States*, 444 U.S. 164 (1979).

158. *Graham* v. *Estuary Properties Inc.*, 339 So. 2d 1374 (Fla.); *Agins* v. *Tiburon*, 447 U.S. 255 (1980).

159 *Infra* n.160.

160. *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978).

161. *Reference Section 94(2) of the Motor Vehicle Act* (1985) 24 D.L.R. (4th) 536, [1986] 1 W.W.R. 481.

162. Peter W. Hogg "The Meaning of Fundamental Justice" 18 C.R.R. 70 at 73.

163. See discussion Chapter III n.2 ff.

164. (1985) 24 D.L.R. (4th) 536, [1986] 1 W.W.R. 481.

165. *Id*. at 563.

166. *Id*. at 541.

167. *Id*. at 536.

168 *Id*. at 564.

169. *Id*. at 559, 563.

170. *Id*. at 545, 556.

171. *Id*. at 548.

172 *Id*. at 549.

173. *Id*.

174. *Id*.

175. *Id* at 550.

176. *Id*.

177. *Id*. at 559.

178. *Id*.

179. *Id*.

180 Id. at 563.

181 Id. at 550.

182 Id. at 550, 557.

183 Id. at 549-50.

184 Id. at 550, 557.

185 Philip N. Augustine, "Protection of the Right to Property under the Canadian Charter of Rights and Freedoms" (1986) 18:1 Ottawa L. Rev. 55 at 74; Robert J. Sharpe, "The Charter of Rights and Freedoms and the Supreme Court of Canada: The First Four Years" (1987) Public Law 48 at 61.

186 See Chapter III n.306 ff.

187 See infra n.51 ff.

188 Reinhold Trelenberg v. Minister of the Environment (Alta), unreported, J.D. of Edmonton, Q.B. 104637, 107234, discussed infra n.78 ff and Chapter III n.306 ff.

189 For example, Allarco Developments Ltd. v. The Council of the County of Lacombe, unreported, J.D. of Red Deer, Q.B. 709 10-00590, 145332 (Alta. Q.B.) discussed in Chapter III n. 246 ff; Hauff v. City of Vancouver (1980) 12 M.P.L.R. 125, aff'd (1981) 28 B.C.L.R. 276, 15 MP.L.R. 8, 24, L.C.R. 109 (B.C.C.A), discussed in Chapter III n.142ff; Re Rodenbush and District of North Cowichan (1978) 76 D.L.R. (3d) 731 (B.C.S.C.), discussed in Chapter III p.132 ff.

190 Id.

191 See Chapter III n.99 -160.

192 [1979] 1 S.C.R. 101, 88 D.L.R. (3d) 462, [1978] 6 W.W.R. 496, 23 N.R. 159.

193 Chapter V n.136ff.

194 Chapter V n.140 and cases cited therein.

195 (1985) 18 D.L.R. (4th) 321.

196 Id. at 337.

197 T.W. Wakeling and C.D. Chipeur, "An Analysis of

Section 15 of the Charter After the First Two Years or How Section 15 Has Survived the Terrible Two's" (1987) 15 Alta. L. Rev. 407; Eric Gertner "Are Corporations Entitled to Equality - Some Preliminary Thoughts" 19 C.R.R. 288.

198 Wakeling and Chipeur, "An Analysis of Section 15 of the Charter After the First Two Years or How Section 15 Has Survived the Terrible Two's," supra n.197 at 432, Gertner, "Are Corporations Entitled to Equality: Some Preliminary Thoughts," supra n. 197 at 296.

199 (1985) 18 D.L.R. (4th) 321.

200 Gertner, "Are Corporations Entitled to Equality: Some Preliminary Thoughts," supra n.197 at 296.

201 See Chapter V n.59 ff.

202 (1986) 12 C.P.R. (3d) 385 (Fed C.A.).

203 (1986) 28 D.L.R. (4th) 429 [1986) 4 N.W.R. 289, 2 B.C.L.R. 324 (B.C.C.A.).

204 (1985) 17 C.R.R. 335 (B.C. Youth Ct.).

205 (1987) 72 N.R. 185 (Fed. C.A.).

206 (1987) 52 Alta L.R. (2d) 62 (Alta. Q.B.).

207 (1986) 28 D.L.R. (4th) 64 [1986] 4 W.W.R. 154 (Alta Q.B.).

208 (1986) 12 C.P.R. (3d) 385 at 391.

209 (1986) 28 D.L.R. (4th) 64 at 69.

210 (1987) 72 N.R. 185 (Fed. C.A.) at 189-90.

211 Smith, Kline and French Laboratories Ltd. et. al. v. Attorney-General Canada (1986) 12 C.P.R. (3d) 385 at 392; Regina v. G. (1985) 17 C.R.R. 334 (B.C. Youth Ct.) at 338; R. v. Allen (1987) 51 Alta. L.R. (2d) 248 (Alta. Q.B.) at 249.

212 The leading case stating this view is Andrews v. The Law Society of British Columbia (1986) 27 D.L.R. (4th) 600, [1986] 4 W.W.R. 242, 2 B.C.L.R. (2d) 305.

213 (1986) 27 D.L.R. (4th) 600 at 609-610.

214 (1987) 72 N.R. 185 at 192.

215 [1986] W.W.R. 401 at 419-21.

216 (1986) 29 D.L.R. (4th) 641, 4 B.C.L.R. (2d) 273, [1986] 5 W.W.R. 638 at 653-54.

217 (1987) 52 Alta. L.R. 62.

218 Unreported, 14 May 1987, Q.B. 8603-12287 (Alta Q.B.) at 10.

219 (1986) 29 D.L.R. (4th) 583 at 593 (Ont. S.C.).

220 (1987) 72 N.R. 185 at 188.

221 Id. at 189-90.

222 (1986) 12 C.P.R. 385 at 388.

223 (1986) 28 D.L.R. (4th) 64 at 70.

224 (1986) 30 M.P.L.R. 301 (B.C.S.C. [In Chambers]).

225 Id. at 301. Section 719(5) provides as follows:

> A by-law under subsection (1) shall provide a schedule of development costs charges and the charges may vary in respect of different defined or specified areas or zones, uses, capital costs related to a class of development, and the sizes or number of units or lots created by or as a result of development, but otherwise the charges shall be similar for all developments that impose capital costs burdens on the municipality.

226 Id. at 303.

227 Id. at 304-5.

228 Id. at 308.

229 (1986) 27 D.L.R. (4th) 600.

230 For discussion on this point see Albert Hudec, "Municipal Exactions and the Subdivision Approval Process" (1980) 38 U. of T. Fac. L. Rev. 106 at 117-21.

231 Infra n.51 ff.

232 260 U.S. 393 (1922).

233 Infra n.89ff.

234 See Chapter I n.23 ff.

235 See Chapter III n.62-81.

236 [1975] 2 S.C.R. 78, 47 D.L.R. (3d) 1, 2 N.R. 429.

237 (1984) 8 D.L.R. (4th) 321, 25 M.P.L.R. 245, [1984] 4 W.W.R. 1983, 53 A.R. 175, 31 Alta. L.R. (2d) 97 (S.C.C.).

238 For example Smith, Kline and French Laboratories Ltd. et al v. Attorney-General of Canada (1986) 12 C.P.R. (3d) 385; Kask v. Shimizu (1986) 28 D.L.R. (4th) 64.

239 Andrews v. The Law Society of Alberta (1986) 27 D.L.R. (4th) 600.

240 These factors, all derived from American decisions, are discussed infra n.89 ff.

241 Planning Act, S.O. 1983, c.1, s.35.

242 Planning Act, R.S.A. 1980, c.P-9, s.72.

243 Infra n.51 ff.

244 Reference Section 94(2) of the Motor Vehicle Act (1985) 24 D.L.R. (4th), 536, [1986] 1 W.W.R. 481.

245 Infra n. 189.

246 Infra n.51 ff.

247 (1985) 24 D.L.R. (4th), 536, [1986] 1 W.W.R. 481.

248 24 Mich. 468, 217 N.W. 58 (1928).

249 144 Mont. 25, 394 P.2d. 182 (1964).

250 49 Cal. 2d. 31, 207 P.2d. 1 (1949).

251 207 P.2d. 1 (1949) at 2.

252 Id.

253 Id.

254 Id. at 7.

255 Id.

256 Id.

257 Id.

258 Id.

259 Id. at 8.

260 207 P.2d. 1 (1949).

261 For example, Jenad v. Village of Scarsdale, 18 N.Y. 2d. 78,218 N.E. 2d. 673,271 N.Y.S. 2d. 955. (1966).

262 207 P.2d. 1 (1949) at 7.

263 Id.

264 See Chapter IV n.11 ff.

265 (1986) 30 M.P.L.R. 301 (B.C.S.C. [In Chambers]).

266 Id. at 308.

267 Id.

268 Id.

269 (1986) 26 D.L.R. (4th) 200.

270 (1985) 17 D.L.R. (4th) 422 at 468-9.

271 (1986) 35 D.L.R. (4th) 1.

272 Id. at 51, 75.

273 Id. at 51.

274 207 P.2d. 1 (1949).

275 176 N.E. 2d. 799 (Ill. 1961) at 802.

276 Id.

277 Id.

278 28 Wis. 2d. 608, 137 N.W. 2d. 422 (1965), appeal dismissed, 385 U.S. 4 (1966).

279 137 N.W. 2d. 422 at 447 (1965).

280 Id.

281 Id.

282 Id. at 446.

283 218 N.E. 2d. 673 (1966).

284 Id. at 675.

285 Id.

286 Id.

287 Id. at 676.

288 25 Misc. 2d. 1004, 209 N.Y.S. 2d. 729 (Sup. Ct. 1960), aff'd 15 App. Div. 2d. 815, 225 N.Y. S2d. 538 (1962).

289 Id.

290 218 N.E. 2d. 673 (1966) at 675.

291 137 N.W. 2d. 422 (1965).

292 218 N.E. 2d. 673 (1966) at 676.

293 4 Cal. 3d. 633, 484 P.2d. 606, 94 Cal. Rptr. 630, appeal dismissed, 92 S. Ct. 202 (1971).

294 Cal. St. 1965, ch. 1809 para 2 (West 1964), as amended, (Supp. 1971) cited in James P. Barber, "Subdivision Exactions in California: Expansion of Municipal Power" (1972) 23 Hastings L.J. 403 at 406.

295 S.11546(b)-(f) (West. Supp. 1[illegible]1) cited in Barber, "Subdivision Exactions in California," supra n.294 at 406.

296 Barber, "Subdivision Exactions in California," supra n.294 at 406-7.

297 Id.

298 Id. at 407.

299 4 Cal. 3d. 633 (1971) at 641-42.

300 These arguments are provided in Barber, "Subdivision Exactions in California," supra n.294 at 424-426.

301 Id. at 425.

302 *Id.*

303 *Id.* at 426.

304 *Id.*

305 *Id.*

306 4 Cal. 3d. 633 (1971) at 638.

307 207 Pd. 1 (1949).

308 4 Cal. 3d. 633 (1971) at 638.

309 *Id.* at 638-640.

310 *Id.* at 641.

311 *Id.*

312 *Id.*

313 4 Cal. 3d. 633 (1971).

314 Barber, "Subdivision Exactions in California," *supra* n.294 at 438.

315 *Id.*

316 Cal. 3d. 633 (1971) at 641-42.

317 *Id.*

318 Alberta Municipal Affairs, *Report of the Advisory Committee on Development Charges and Off-site Levies* (August, 1986) 13-15.

319 *Id.* at 16-19.

320 (1986) 26 D.L.R. (4th) 200.

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